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# Rights of Tenderers and Contractors under Saudi Public Procurement Contract Regulations: A Comparative Study with England and Wales

By  
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of Doctor of Philosophy of the University of Durham, Durham  
Department of Law

Volume 1

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### **Declaration**

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ  
{ يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ }  
سورة المائدة، آية رقم 1

In the name of Allah, Most Gracious, Most Merciful.

**{O ye who believe! Fulfil (all) obligations}**

*The Holy Qur'an, Chapter 5, Verse 1*

## *Dedication*

This work is dedicated to the memory of my grandfather, a Chief Judge, who spent his life in the cause of Justice in Saudi Arabia.

Also to my father, a Chief Judge, a man of honour and integrity, who taught me to walk in the paths of truth and righteousness.

And to my mother for her loving support throughout my life.

## Abstract

This thesis is a comparative study in which the rights of tenderers and contractors and related procurement regulations are discussed and compared under Saudi public procurement contract regulations and those of England and Wales. This thesis does not aim to be a comprehensive comparative study, but presents examples to illustrate the issues under discussion.

A central aim of the study is to consider whether Saudi public procurement contract regulations are suitable to protect the rights of tenderers and contractors and to solve their problems in the rapid development of the country. Is the Purchasing Law, in particular, able to cover the rapid development in procurement and the economy in Saudi Arabia and the world? This question is asked in order to examine the weaknesses of current procurement regulations and to explore procurement claims that the Purchasing Law fails to address tenderers' and contractors' rights and concerns.

Many criticisms have been raised regarding Saudi public procurement contract regulations, especially the Saudi Purchasing Law. Although the Saudi government has called for the procurement sector to play a greater role in national development, the Purchasing Law does not support this aim. It has remained unchanged since it was enacted in 1979, despite rapid economic changes in the country. Contractors, traders, banks, and Saudi Chambers of Commerce have complained that they are too constrained by the provisions of the Purchasing Law.

The ten chapters of this thesis examine the rights of procurement tenderers and contractors throughout the procedures to prepare and award a public procurement contract. In addition to identifying the principles of procurement regulations, this study investigates the rights of tenderers and contractors from the first steps of tendering procedures to the awarding of the contract and afterwards. Once the contracting authority selects a successful contractor this study highlights his rights to obtain his financial payment and to obtain remedy if the contracting authority breaches its contractual obligations.

The study examines case law, procurement regulations, circulars and governmental procedures in procurement. The study results indicate that Saudi public procurement contract regulations in general and the Purchasing Law in particular are inadequate to keep pace with development requirements in the country. More specifically, the findings show that current Saudi procurement regulations are in fact obstacles to the development of the procurement sector, and a main reason for contractors' unwillingness to enter the governmental procurement market.

## Acknowledgements

All praise and thanks be to Allah, the Almighty God, without his help and guidance the completion of this work would not have been possible, and peace be upon His messenger, Mohammed, who said: "Whoever is not thankful to people then he cannot be thankful to Allah, either".

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## **List of Abbreviations**

AH	After Hijra
BLR	Building Law Report
DC	Developing Countries
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
FIDIC	Federation International des Ingenieurs Conseils
GATT	General Agreement on Trade and Tariffs
GCC	Gulf Co-operation Council
GDP	Gross Domestic Profit
GPA	Government Procurement Agreement
ICE	Institution of Civil Engineers
ICE	Design and Construct Conditions of Contract issued by the Institution of Civil Engineers.
JCT	Joint Contracts Tribunal form
MFN	Most Favoured Nation
MOD	UK Ministry of Defence
MODA	Saudi Ministry of Defence and Aviation
NHS	National Health Service
NSC	Nominated sub-contractor Contract
NT	National Treatment
PFI	Private Finance Initiative
PGE	Presidency of Girls' Education
PPP	Public-Private-Partnership
SABIC	Saudi Basic Industries Corporation
SAMA	Saudi Arabian Monetary Agency
SEC	Supreme Economic Council
SIDF	Saudi Industrial Development Fund
SMEs	Small and Medium Enterprises
SR	Saudi Riyal
The Board	The Board of Grievances
UNCITAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

## Chapter One

### General Introduction

# Chapter One: General Introduction

## Preamble

Public procurement contracts play an important role in the national economy of countries. They usually contribute a significant proportion of Gross Domestic Product (GDP), for example, they accounted for 14.4 per cent of non-oil GDP in Saudi Arabia in 2002<sup>1</sup> and 15 per cent of GDP in the UK in 2005.<sup>2</sup>

The Saudi government invests huge budgets annually to provide education, health, utilities and public services in order to achieve its social and political objectives. Most public services are provided through procurement contracts. In addition to its aforementioned contribution to non-oil GDP, the procurement sector employed more than one million workers in 2002.

## A. Aims of the study

This thesis explores of public procurement regulations in Saudi Arabia and focuses in particular on the rights of tenderers and contractors under Saudi public contract regulations, comparing such rights with similar rights under England and Wales public contract regulations.

A primary aim is to consider whether Saudi public contract regulations are adequate for protecting the rights of tenderers and contractors and

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<sup>1</sup> Saudi Chambers of Commerce, *The Finance Difficulties which Face Saudi Contractors*. Working paper produced at the Saudi Contractors' Annual Meeting, Saudi Chambers of Commerce, Riyadh, 10/2/2002.

<sup>2</sup> J. Amos, 'Freedom of Information and Procurement: A Practical Guide for Public Authorities', a research published on the Constitutional Unit's website, Tuesday, 22 March, 2005 on <http://www.uk/constitution-unit> and <http://www.egovmonitor.com/node/180>



solving their problems in the light of the country's rapid development. In particular, is the Saudi Purchasing Law able to deal effectively with the rapid development in procurement and changes in the economy in Saudi Arabia and the world? This question is asked in order to examine weaknesses of current procurement regulations and to explore procurement contractors' claims that the present Purchasing Law fails to address their rights and concerns.

### **B. Main Objective**

The main objective of this study is to assess the rights of procurement tenderers and contractors under Saudi public procurement contract regulations. This objective will be achieved by answering the following questions:

- What is the impact of national development on public procurement contract regulations in Saudi Arabia?
- What are the main principles governing procurement regulations?
- What are the Rights of the contractor during the preparation of tenders?
- How does the contracting authority evaluate and compare various tenders in order to select a successful contractor?
- What are the rights of sub-contractors?
- What is the right of the contractor when the contracting authority delays paying his bills?
- Does the contractor have the right to obtain remedy if the contracting authority breaches its contractual obligations?

### **C. The Significance and Importance of the Study**

Even though the procurement sector has had a long history in Saudi Arabia since the Saudi State was established in 1932 (1352 AH<sup>3</sup>), this sector generally, and the contractor in procurement contracts specifically, have not had their fair share of research, study and critique. In fact, there is a general absence of legal texts on public procurement in Saudi Arabia. Thus, researchers, specialist solicitors, traders, and foreign investors, face difficulty ascertaining the nature and size of this sector and clarity is lacking concerning the rights and obligations that relate to each of the parties in procurement contracts. At an academic level, for example, there is no course or subject in Saudi universities pertaining to procurement, the rights of procurement contractors, or their obligations. There is only a general course on administrative contracts, which covers administrative rules and the difference between administrative and civil contracts, in broad terms. Moreover, only one book about Saudi procurement regulations has been published in the country in the last eighteen years.<sup>4</sup>

Further, there is a great need to highlight and spread awareness of specific government administrative circulars relating to the procurement sector, because there is a large number of such administrative circulars and decisions, and they are not gathered into one series. Contractors, especially foreigners, have difficulty in obtaining them, yet are held to signing

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<sup>3</sup> AH: After Hijra. Saudi Arabia uses the Islamic calendar based on a lunar year rather than the Gregorian calendar which is based on a solar year. The Islamic calendar is reckoned from the time of the migration (Hijra) of the Prophet Mohammad (Peace be upon Him) (622 AD) from Makkah to Madinah.

<sup>4</sup> Al - Wehaiby, " *The Organising Principles for Administrative Contracts and their Applications in Arabia*", (1<sup>st</sup> Edition, Riyadh, 2002).

procurement contracts that include a condition that they have read the Purchasing Law, its Implementing Regulations, circulars, and governmental decisions relating to it. If they wish to understand more fully their rights and obligations, which the contract they sign does not explicitly mention, it is their responsibility to gain access to copies of such information.

To the best of the author's knowledge, there has not been any Ph.D. study previously registered in Saudi Arabia or the UK focusing on Saudi procurement regulations. Accordingly, to the best of the author's knowledge, this study is the first doctoral thesis registered in the UK focusing on the Saudi procurement sector. In Saudi Arabia, there is no programme for completion of a doctorate in Law, and, consequently, the Purchasing Law is not studied academically in the country. Against this background, this study aims to explore and understand the rights of procurement contractors in Saudi Arabia in particular and reasons for the lack of procurement regulations in general. It is hoped that this study will fill the gap that exists in the literature.

In addition, it is anticipated that the results of this study will be useful to procurement contractors, contracting authorities, and government departments, both locally and internationally. First of all, at the national level, the study should be of particular interest to relevant governmental officials to assist their understanding of practices overall, help them identify major obstacles in procurement regulations, and provide possible solutions to existing shortcomings in current regulations. In Saudi Arabia, individuals expected to be interested in and benefit from the results include:



1- Procurement contractors, both local and foreign, who are the main party in procurement contracts; 2- Saudi law-makers, especially in the Council of Ministers and the Consultative Council, empowered with the jurisdiction to draft and enact regulations in the country; 3- Procurement officers who draft the procurement contract, control its performance and open and evaluate procurement tenders; 4- Judges who deal with procurement cases brought before the Board of Grievances; 5- Finance officers who deal with budget preparation and control in the Ministry of Finance and the General Audit Bureau, and are responsible for approving all government departments' budget and control; 6- Saudi Chambers of Commerce, in particular, and foreign Chambers of Commerce are expected to benefit from this study's results as well as private firms intending to establish their procurement business; 7- Academics, lawyers, researchers, and other interested people may find the findings of this study useful; and 8- Members of the Saudi team representing Saudi Arabia in negotiations to join the GPA<sup>5</sup> since the findings may help to provide solutions to questions posed by other negotiators regarding discrimination in favour of Saudi products and contractors; 9- Internationally, the study may be generally useful for understanding procurement regulations and practice in the UK in particular, other EC member states, the GPA, and the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

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<sup>5</sup> Saudi Arabia joined the World Trade Organisation on 11 November 2005. Some members of the WTO requested that Saudi Arabia undertake to accede to the Agreement on Government Procurement (GPA) upon accession to the WTO, but representatives from Saudi Arabia confirmed that the country will initiate negotiations for membership on the GPA within a year of accession. Report of the Working Party on the Accession of Saudi Arabia to the WTO, WT/ACC/SAU/61. 1 November 2005, p. 76.  
[www.wto.org](http://www.wto.org)

This study will present many suggestions for reforming the Purchasing Law, to address increasing complaints from traders, contractors, and banks, that this sector has failed to keep up with the development that Saudi Arabia has experienced generally. Particularly, in light of the opening of Saudi Arabia to foreign investment, and its participation in custom unions and free trade areas, the Saudi Purchasing Law is no longer adequate for managing the rights and obligations of contractors. It is no longer in line with the spirit of the era, or with economic, social and legal developments in Saudi Arabia.

#### **D. Structure of the thesis**

In general, this thesis is divided into three parts, each one building on the other. The first part, comprising the first four chapters, provides general background details of the characteristic features of public contracts, and general principles of procurement contracts, and discusses the rights of tenderers and contractors according to these principles. The second part (chapters five and six) explores procedures to find a suitable contractor to perform the procurement contract, starting with inviting tenders from private firms, and then opening and evaluating them. Once the contracting authority has selected the best tenderer to perform the contract, the third part of the study (chapters seven, eight and nine) moves to the next stage, the performance of contracts, and describes the rights of contractors during this stage.

In more detail, the organisation of the thesis proceeds as follows. After this introductory chapter, the second chapter describes the development of public procurement contract regulations in Saudi Arabia. This is a necessary preliminary in order to understand the development of the procurement sector and its importance to the national procurement market. The second part of the chapter explores public procurement contract policies and related regulations under UK and Saudi procurement systems. This background chapter concludes that whereas UK public procurement contract regulations are subject to periodic review, more than twenty-five years have elapsed without any major changes to or development in Saudi Purchasing Law.

Chapter three investigates the characteristics of public contracts and distinguishes between public and private contracts. It determines the public character of a contract, defines the elements of public contracts, and analyses some types of public procurement contracts.

Chapter Four analyses three main areas of the principles governing procurement contracts: equal treatment and transparency. The equal treatment principle can be held to be directly applicable to contracts made by a public authority, in that it applies without need for implementing legislation. Notwithstanding, contractors still complain there is discrimination practised against them and are unhappy about the wide power the contracting authority possesses during contractual procedures. Lack of transparency is another major problem under the Saudi procurement system. The chapter examines the lack of transparency relating to contractors' rights and procurement regulations.

Chapter Five discusses the preliminary steps which the contracting authority must take before awarding a contract. It focuses on preparation of tenders documents and specifications, advertising the intention of the contracting authority to seek bids, and methods of obtaining tenders.

Chapter Six analyses the middle and final stages of tendering procedures before the contracting authority selects the contractor. The contracting authority usually invites tenderers to send their tenders, which are then opened on a particular day and evaluated by comparing prices and conditions. The contracting authority is required to select one tenderer as the contractor. Although tendering procedures are virtually the same under Saudi and UK procurement regulations, the evaluation procedures differ.

Chapter Seven is divided into three parts in order to investigate the rights of sub-contractors under Saudi and UK procurement regulations. It first considers sub-contract requirements, which the main contractor or contracting authority should follow to sub-let part of the main contract. Then it reviews the assignment of the main contract, explaining when the main contractor can assign whole or part of his contract, and subsequently discusses the financial rights of the main contractor. The third part explains how sub-contractors are selected under the two procurement systems. The chapter also examines the obligations of the concerned parties during performance and after completion of work under the sub-contract.

Chapter Eight deals with the contractor's right to late payment of the contract price under Saudi and UK regulations. Delayed payment presents a problem to procurement business both in Saudi Arabia and the United

Kingdom. This problem has remained for more than two decades in Saudi Arabia without an effective solution. This chapter explores the reasons for lateness of payment by analysing the financial procedures which contractors must follow to be paid. Accordingly, this chapter discusses the ability of the contractor to suspend the work if the contracting authority has delayed his payment and the Board's decisions regarding late payment.

Chapter Nine explores the right of the contractor to remedy for breach of contract. Procurement contracts, in general, contain provisions permitting parties to remedy their detriment. The first of the chapter will examine various methods for obtaining remedy for breach of contract under the Saudi procurement system and the second will analyse this subject under the UK procurement system.

Chapter Ten draws together the findings and recommendations from each chapter, explains the contributions of the study, and provides suggestions for future research.

Throughout the thesis, at the end of each chapter, a comparative analysis is undertaken to compare the theme of the chapter under the two procurement systems, highlighting similarities and differences, and proposing recommendations to develop the relative approach under Saudi procurement regulations.

During the course of writing this thesis, Saudi and UK procurement regulations constituted an important basis for the study. Because they are used as a major reference throughout, it seemed the value of this study might be greatly enhanced if it included those regulations to which reference

is made. An accompanying volume to this thesis has therefore been prepared containing the cited regulations.

### **E. Methodology**

This thesis examines the legal literature through library research and electronic resources and examines the Board of Grievances' and EC and UK courts' support of the principles of Saudi and UK public procurement contracts' regulations. It reviews case law, procurement regulations, circulars and governmental decisions in relevant areas to discover how procurement tenderers and contractors are protected, and provides solutions to weaknesses identified in Saudi Purchasing Law.

In order to attain the aims of this study, it is necessary to point out that this thesis does not discuss public procurement contract regulations only, but explores some rules in different regulations, notably, the constitutional law of the United Kingdom, the budget phase in particular, in order to examine the grounds for the public authority delaying payment to contractors as mentioned in chapters and two and eight. In addition, this study will examine the general rules of the contract law of England and Wales, Scotland and Ireland including the management phase as mentioned in chapters two, eight and nine.



**F. A comparative study**

This thesis is a comparative study in which the rights of tenderers and contractors and related procurement regulations are discussed and compared under Saudi and England and Wales public contract regulations. Because procurement regulations of England and Wales are more advanced in development than Saudi procurement regulations,<sup>6</sup> they are selected as a model or benchmark to reform Saudi procurement regulations. The intention is not to provide suggestions for reforming weaknesses in procurement regulations of England and Wales, but to benefit from their advanced development and to draw useful lessons from them to remedy weaknesses in Saudi regulations.

Other reasons for selecting procurement regulations of England and Wales as a benchmark against which to compare Saudi procurement regulations are presented below.

When the Thatcher government came to power, it sought to reform the public sector, public services in particular, due to inefficiencies. The Saudi government is facing a similar situation. The public sector is characterised by poor management, extensive bureaucracy and inefficiency, which characteristics are hindering development of the public procurement sector. The present comparative study may provide useful insights to assist its development.

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<sup>6</sup> For example, the new EC procurement directives, which must be implemented by Member States by January 31, 2006, provide a framework for conducting a range of procurement activities electronically. The new rules aim to establish rules for tendering electronically and to regulate e-communications in procurement processes. See R. Bickerstaff, *The Commission's Action Plan for a Framework for Electronic Public Procurement*, (2005) 3 *Public Procurement Law Review*, p. NA62.

Further, UK procurement employees' practices when dealing with procurement contractors are flexible and they have been given extensive powers and responsibility to manage performance of the contract. In contrast, Saudi procurement employees have to follow a complex governmental routine when managing procurement contracts' performance. For example, according to information provided by the Head of the procurement section in the National Assembly of Wales, (see Chapter 7, p. 232), England and Wales public procurement employees have the power to assist a procurement contractor financially if he faces a financial problem during execution of the contract to enable him to complete it. This power is not given to Saudi public agencies. Neither procurement officers, nor members of the Examination Committee, have the power to assist a contractor financially in order to help him remedy his financial problems. Saudi law-makers may therefore benefit from several UK public procurement employees' practices.

Another reason for choosing the procurement regulations of England and Wales as a model is their identicalness to EC Procurement Directives and their useful lessons for Saudi procurement regulations. Implementation of the procurement regulations of England and Wales must comply with main principles set out in the EC Treaty, such as anti-discrimination, equal treatment, and freedom of movement of goods and people requirements. Accordingly, in addition to internal economic development, procurement regulations of England and Wales are affected by new EC economic and procurement developments, distinguished by ongoing amendment, and benefit from the procurement experiences of different EC Members. In this



respect, some of the general legal principles upon which the European Procurement Directives have been established, may provide useful guidelines for Saudi Purchasing Law.

Moreover, the procurement regulations of England and Wales are modern and subject to periodic revision as a result of economic and trade developments in the UK and the world. In fact, the National Procurement Strategy is subject to development each year. This practice may encourage Saudi law-makers to devise an annual strategy to develop the procurement sector.

It should be pointed out that there are, of course, general inherent difficulties in comparing two legal systems in two different jurisdictions, since they are shaped by different customs and attitudes. Nevertheless, the aim of the comparative study is to identify strengths in UK procurement regulations which could be transferred to Saudi procurement regulations. Accordingly, this study seeks to look at various ways of effecting legal reform within the remit of Saudi procurement regulations.

It is important to point out that this study compares Saudi procurement regulations with 'UK public procurement regulations' and 'contract law regulations of England and Wales'. It uses the phrase 'UK public procurement regulations' more frequently than 'the regulations of England and Wales' because the procurement regulations (public works, supply and services) are applied in the three legal systems of the UK, namely, England and Wales, Northern Ireland, and Scotland. The principles of UK public procurement regulations are discussed in chapters 4, 5, 6, 8 and 9. Moreover,

the principles of England and Wales contract law regulations are referred to in chapters 7, 8, and 9.

## **G. Definitions**

Many terms repeatedly occur throughout the thesis. Their definitions are given below.

### **Breach of contract**

A breach of contract will occur when a party without lawful excuse fails or refuses to perform his contractual obligations specified in the contract.

### **Bidder, tenderer**

A bidder or tenderer is a private firm working in the procurement market, invited by the public agency to submit its offer to carry out work in the form of a tender. This thesis uses the term 'tender' more frequently than 'bidder'.

### **Contractor**

A contractor is a private firm which has been selected by the public agency, either directly or through the tendering competition, to perform the procurement contract. It should be borne in mind that this thesis uses the term 'contractor' to describe the status of a private firm selected as a successful contractor to perform the contract until its completion.

**Contracting authority**

A contracting authority is a public body which deals with a private firm selected as a contractor to carry out the work, or deliver services to it, and which has the power to manage and control the performance of the contract.

**Discrimination**

Discrimination occurs where foreign contractors are treated in a manner differing from or less favourably than that meted out to local contractors in comparable circumstances.

**Good faith**

The phrase 'good faith' is used in a variety of contexts, and its meaning varies with the context. A contract performed in good faith is one that has been honestly and faithfully completed to an agreed common purpose and is consistent with the justified expectations of the other party.<sup>7</sup>

**Invitation**

A formal letter sent to private firms requesting them to send their procurement tenders to the contracting authority in order to enter the procurement competition to procure.

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<sup>7</sup> B. Garner, Black's Law Dictionary, 7<sup>th</sup> edition, West Group, St. Paul, 1999, p. 701.

**Monopoly**

A commercial monopoly arises where the supply of certain goods or services is controlled by one manufacturer, trader or group, which has exclusive control of the procurement market and can therefore control prices and exclude competition.<sup>8</sup>

**Procurement sector**

The procurement sector is that part of economic and administrative life which deals with the delivery of goods and services by and for the government and its branches.

**Work**

Work refers to the subject of the procurement contract or the things (for example goods, service, etc.) which are to be procured.

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<sup>8</sup> L. Curzon, Dictionary of Law, 6<sup>th</sup> edition, Longman, London, 2002, p. 229.

## **Summary**

This chapter has presented an overview of the background to the research problem, provided a brief explanation of the study's aims, main objective, and reasons for selecting a comparative study, as well as indicated the significance and importance of the study. The structure of the thesis has also been outlined. Since the study aims to assess the rights of procurement contractors under Saudi procurement regulations, the next two chapters provide an overview of the development of public procurement contract regulations in Saudi Arabia and explore main principles underling procurement contracts.

## Chapter Two

### The Development of Public Procurement

#### Contract Regulations in Saudi Arabia

## **Chapter Two: The Development of Public Procurement Contract**

### **Regulations in Saudi Arabia**

Procurement contract regulations in Saudi Arabia appear to have existed since 1924, when King Abdulaziz established a committee to regulate the government's purchasing requirements. Procurement regulations emerged with the enactment of the first Bid and Tender Act in 1968 development of the local procurement sector.

This chapter will be divided into two parts to explore public procurement contracts regulations' development in Saudi Arabia. The first part will describe development of local procurement sector, while the second will investigate public procurement contract policy and related regulations in UK and Saudi procurement systems.

#### **I. Development of the local procurement sector**

The Saudi government has expressed its commitment to expand the private sector's role in the development process and consequently embarked on a major project to expand the industrial base by establishing a modern non-oil industrial sector. Since the early 1980s, the Saudi economy has been moving from the stage of building the basic infrastructure to the stage of producing goods and services. Therefore, since completing major infrastructure during the first Four Development Plans,<sup>1</sup> the government has encouraged the private sector to play an important role in national development and handed over to it some of the tasks it had been performing.

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<sup>1</sup> Since 1970, Saudi-economic development has been pursued via a series of government plans, covering a period of five years.

Moreover, it has undertaken not to engage in some activities the private sector is performing. Thus, the procurement sector has been encouraged to play a greater development role and increase its participation in some areas where the government had traditionally provided services, such as some public utility and transport services.<sup>2</sup>

According to the Commerce Ministry, more than 108,648 companies and establishments are working in the procurement sector with a combined capital investment of SR 70 billion<sup>3</sup> or 14.4 per cent of non-oil GDP.<sup>4</sup> Their activities account for more than one million jobs, 15 per cent of the total labour force.<sup>5</sup>

Procurement growth is affected by the development of the country's economy, which can rapidly rise and sharply decline. Before 1970, the procurement sector was very weak and too small to satisfy the needs of the country. After the oil boom in the 1970s and because of the adoption of various development plans, the procurement sector underwent a renaissance, especially in the field of construction.

The country began to follow a free trade policy, believing that such a policy and the competition it engenders efficiently and effectively utilise resources.<sup>6</sup> It is committed to the free market economy principle, therefore,

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<sup>2</sup> Seventh Development Plan, *Ministry of Planning*, 2000-2004, p. 42.

<sup>3</sup> Saudi Riyals (SR) per US \$ = 3.7450 a fixed exchange rate since 1986.

<sup>4</sup> Commerce Ministry, Commercial Registration Office, Report published in Riyadh in 10/2/2002. However, according to a study published in *Tejarat Al-Riyadh Magazine*, only 8417 firms are classified as such by the Ministry of Public Works, Classification Department. The rest are working in the procurement market without classification. Year 42, July 2002, p. 43

<sup>5</sup> Sixth Development Plan, *Ministry of Planning*, 1995-2000, p. 241.

<sup>6</sup> F. Al-Farsy, *Modernity and Tradition: the Saudi Equation*, (London, Knight Communication Ltd, 1996), p.198.



the private sector is free to invest in whatever economic activities it chooses,<sup>7</sup> there is free movement of capital in and out of the country, controls supply and demand and supply is influenced by market force.

Although Saudi Arabia, which was unified in 1932, is the world's largest oil producer, it is still a developing country. Its development is guided by Five Year Plans which started in 1970. The country has completed seven development plans. A brief look at these plans illustrates the country's development growth. The first two plans (1970-1980) were characterised by extraordinary government investment, which provided the institutional framework needed for economic development by establishing new ministries and public agencies and by upgrading the existing administrative bodies.<sup>8</sup> The third plan (1980 - 1985) called for continued infrastructure development as investment aimed at filling gaps in the economy and creating export commodities.<sup>9</sup>

In the 1980s, the Saudi government started to recognise the importance of reducing its dependence on the production of crude oil as the primary source of international income. The dramatic decline in oil prices in 1985 forced the government to reinvigorate the national economy. As a consequence, the government began to rely more on private firms. It initiated plans to establish basic industrial projects. In order to encourage private parties to participate in national development, the government provided

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<sup>7</sup> Saudi Arabian Monetary Agency Annual Report, Riyadh, 2003, p.25.

<sup>8</sup> Sixth Development Plan, *supra* n. 4, p. 39.

<sup>9</sup> *Ibid*, p.41.

subsidies and offered a protected economy. These policies led the government to adopt the fourth development plan.

The fourth plan (1985-1990) was informally called "the private sector plan". The government reduced the dominance of the public sector within the economy and placed much more reliance upon the private sector.

The subsequent Gulf War, 1991, forced the government to shift the objectives of the fifth plan (1990-1995) towards a greater role for the private sector and to increase its participation in some areas where the government had traditionally provided services, such as public utilities and transport. According to Al-Farsy,<sup>10</sup> with the private sector increasingly shouldering these responsibilities, the government was enabled to concentrate its resources on the discharge of those functions and the provision of those facilities and services which are properly the responsibility of government, e.g. utilities.

The impact of the Gulf War affected the growth of the economy. The sixth development plan (1995-2000) was implemented in a difficult environment, which affected some key plan targets. Global oil prices declined, which resulted in a down-turn in oil revenues. Oil prices fell by about 38 per cent during the third year of the plan, 1998, which affected both the government budget and the balance of payments.<sup>11</sup> Thus, the government implemented measures to rationalise expenditure and raise non-oil revenues and embarked on other structural reforms. One of these measures was privatisation of some parts of the public sector. Most of the privatisation process affected enterprises involved in the procurement sector. The

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<sup>10</sup> F. Al-Farsy, *supra* n.6, p.175.

<sup>11</sup> Seventh Development Plan, *supra* n.2, p. 59.

government transformed Saudi Telecom into a Joint Stock Company.<sup>12</sup> In addition, it restructured the electricity sector, which had previously consisted of several provincial-level companies and small-scale projects, into one company.<sup>13</sup> Further, the Council of Ministers established "a Saudi Joint Stock Company for Services in Jubail and Yanbu Industrial Cities",<sup>14</sup> to undertake operational, maintenance, management and construction works for infrastructure projects through private sector participation.

In the seventh development plan (2000-2004), special attention was given to the procurement sector, in particular to maintaining existing infrastructure. It called for "emphasising the maintenance of existing infrastructure in a proper operational condition with maximum efficiency of utilisation and minimum costs".<sup>15</sup>

Rapid national and global economic changes have had various influences on the Saudi market. Private firms in general and procurement firms in particular have expanded. The seventh plan reported that annual private investment rose from SR 1 billion in 1970 to about SR 78.6 billion in 1999.<sup>16</sup> The number of operating factories had increased from 199 in 1970 to 3,123 in 1999, while the number of companies in the private sector had increased from 923 in 1970 to 9,302 in 1999. The share of the private sector had reached 50.6 per cent of GDP and 74 per cent of non-oil GDP by the end of the sixth plan in 1999. Total employment in the sector had increased from

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<sup>12</sup> Council of Minister Decision no. 135 dated 15/9/1418 AH (1998).

<sup>13</sup> Council of Minister Decision no. 169 dated 11/8/1419 AH (1999).

<sup>14</sup> Council of Minister Decision no. 57 dated 28/3/1420 AH (2000).

<sup>15</sup> Seventh Development Plan, *supra* n. 2, p. 109.

<sup>16</sup> *Ibid*, p. 50.

about 1.83 million in 1970 to 6.16 million by 1999. Currently, private sector employment accounts for 85.9 % of total employment.<sup>17</sup>

In the late 1990s, the government began to introduce several economic and legislative changes. It established the Supreme Economic Council (SEC)<sup>18</sup> to formulate and control the execution of economy policy. New doors were subsequently opened to foreign investors after the Council of Ministers issued a new investment act.<sup>19</sup> Also, the government established the Supreme Council for Oil<sup>20</sup> and in the judiciary sector it enacted for the first time the Code of Law Practice.<sup>21</sup>

On 5 February 2004, the Saudi government finished its round of accession talks to join the World Trade Organisation WTO.<sup>22</sup> It agreed to drop some of its restrictions on foreign investment and to open some of its services sectors to overseas firms. The Saudi working report, realised in late January 2004, contained new information on pricing policies, monetary and financial policies, investment rules, intellectual property protection, and rules governing the provision of services. Many items that are still on the "Negative List",<sup>23</sup> most of which are related to government procurement, according to Saudi officials, "will be removed upon accession". The "Negative List" was drawn up by the Saudi Arabian General Investment Authority (SAGIA), which was created in April 2000 to attract foreign capital. The list has gradually

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<sup>17</sup> *Ibid*, p.171.

<sup>18</sup> Royal Order no. A / 111 dated 17 / 5 / 1420 AH (1999).

<sup>19</sup> Royal Decree no. M / 1 dated 1 / 5 / 1421 AH (2000).

<sup>20</sup> Royal Order no. A / 212 dated 27 / 9 / 1420 AH (1999).

<sup>21</sup> The Code of Law Practice, Royal Decree no. M / 38 dated 28 / 7 / 1422 AH (2001).

<sup>22</sup> *Riyadh Newspaper*, Issue no. 13012, Friday, 5<sup>th</sup> of February, 2004.

<sup>23</sup> A "Negative List" is a list of economic activities enacted by the Supreme Economic Council, decision no. 11/21 dated 17/11/1421 AH (2001), pursuant to Article 3 of the new Foreign Investment Act (2001 ). The list aims to close such activities to foreign investors. The list has been trimmed twice, in August 2002 and February 2003.

narrowed but it still includes 16 major fields which are closed to foreign investors. The list includes the manufacturing of military equipment, insurance services, tourism services, and land and air transportation services.<sup>24</sup> The country has, however, still refused to liberalise its financial services sector,<sup>25</sup> thus, foreign investors still face some barriers in the Saudi market.

In spite of the many concessions the country has been forced to offer to make to join the WTO, the country is still not ready to join the Government Procurement Agreement (GPA). Preferences for local products and contractors, unequal treatment, and the small sizes of local procurement firms which precludes local firms from competing against international firms are some reasons for the government's reluctance to open its procurement market widely or without restrictions to foreign contractors.

On the UK side, public procurement has been playing an important role in the national economy. Public services need to provide better services and reflect the needs of people in the country. The aim of the government is to ensure that services are provided and delivered effectively at best value to those who use them.<sup>26</sup> One of the budget strategies is to ensure that everyone has access to high quality public services.<sup>27</sup> In July 1998, the government expressed its intention to invest and reform key public services

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<sup>24</sup> *Gulf News Magazine*, Online edition, Sunday, 15 February 2004.

<sup>25</sup> Bridges, *Weekly Trade News Digest*, vol. 8, no. 5, 12 February 2004.

<sup>26</sup> HM Treasury, *Modern Public Services for Britain: Investing in Reform, Comprehensive Spending Review: new Public Spending Plans*, HM Treasury, London, 1999-2002, July 1998, p.33.

<sup>27</sup> HM Treasury, *Building a Stronger Economic Future for Britain*, Economic and Fiscal Strategy Report and Financial Statement and Budget Report, HM Treasury, London, March 1999, p.65.

over the following three years.<sup>28</sup> The 2001 budget provided an extra 2.5 billion pounds for expenditure over the following three years on key public services to fulfil priorities.<sup>29</sup> Some 10 billion pounds are also spent each year on military equipment, including the procurement of spares and associated costs.<sup>30</sup> The 2004 Spending Review set outcome-focused targets and outlined spending plans for 2005-08. Over these four years, the UK government plans to spend over £20 billion on public services.<sup>31</sup>

### **Saudi procurement sector development problems**

The procurement sector has developed very rapidly over successive development plans to become one of the most productive and fast expanding economic sectors in the country. In 2001, more than 108,648 procurement firms were working in the procurement market with a combined capital investment of SR 70 billion or 14.4 per cent of non-oil GDP.<sup>32</sup> The Construction sector flourished during the first three development plans, playing a major role in the expansion of procurement. There was strong competition between Saudi and non-Saudi firms. Saudi firms executed more than 56% of infrastructure projects, while foreign firms executed the rest. While Saudi firms dominated the performance of small projects, such as housing, roads, and sewage, foreign companies executed large projects, such

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<sup>28</sup> *Ibid.*, p. 66.

<sup>29</sup> HM Treasury, Budget 2002: Investing for the Long Term: Building Opportunity and Prosperity for All, Economic and Fiscal Strategy Report and Financial Statement and Budget Report, HM Treasury, London, March 2002, p.9.

<sup>30</sup> National Statistics, UK 2002, "*The Official Yearbook of Great Britain and Ireland*", London, 2003, the Stationery Office, p.105.

<sup>31</sup> Budget 2005, March 2005, HM Treasury, HC 372, p.133.

<sup>32</sup> Jeddah Chamber of Commerce, *The Difficulties that Face Contractors on Financing their projects*, a paper presented to the first meeting of the Contractors' Committee of the Saudi Chamber of Commerce, Jeddah Chamber of Commerce, 10 Feb. 2001, p.7.

as the construction of two industrial cities, Jubail and Yanbu, which was mainly divided between Korean and Japanese firms, the King Saud University project, and the operation of Saudi Telecom.<sup>33</sup>

Despite the rapid development of the procurement sector, such development has not been without disadvantages. One of the main problems facing private firms in the procurement sector is financing.<sup>34</sup>

Finance is central to the success of any business enterprise. It plays a substantial part in the existence and development of many firms. Lack of finance is inhibiting the growth of the procurement sector. New and growing firms are encountering difficulties in obtaining adequate funding, particularly in the early stage.

Rapid development of the country and huge procurement projects, especially during the first three development plans, encouraged Saudi citizens to establish procurement firms. Most of these were small firms established without undertaking feasibility studies of the market or of the project they intended to perform. They faced no difficulties in the early development plan period, because the Saudi Industrial Development Fund (SIDF) provided them with funding. In addition to minor resources, there were three other fundamental sources of funding for procurement firms: government loans, commercial banks, and family funds.

According to Al-Farsi,<sup>35</sup> the SIDF's loans covered a wide range of industrial sectors, including construction materials, industrial products and

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<sup>33</sup> How to Develop the Construction Sector, a paper presented to the National Committee for Contractors, the Consultant Centre for Finance and Investment, Riyadh, January 1988, p. 26.

<sup>34</sup> I. Akas, Finance and Development, *Tejarat Al-Riyadh Magazine*, Issue no. 487, January 2003, p. 34.

<sup>35</sup> F. Al-Farsi, *supra* n. 6, p. 186.

equipment, transport products, electricity and gas. The SIDF, from 1974 – 1984, approved 906 loan applications to finance 788 projects, to a total value of SR 11,200 billion. Besides the SIDF, commercial banks, either local or in the Gulf States, especially Bahrain Offshore Banking Units, granted loans to local contractors. Further, most new firms received their initial support from owners or from family connections.

The economic crises after 1984 created many financial difficulties for the business market in the country. The sharp decreases in oil prices forced the country to change its strategic plans and negatively affected the procurement market. The SIDF took a long time to study and review the ability of contractors before approving their applications. Commercial banks tightened up their loan conditions following a number of bankruptcies, particularly within the construction sector.<sup>36</sup> Many procurement firms, especially small firms, were forced to leave the market.<sup>37</sup> Those that stayed were burdened with heavy interest and long term loans. Larger firms, on the other hand, had more resources, which helped them to survive and enabled them to seek out more opportunities and to absorb any unexpected changes in the market. While it may be that the decreases in oil price affected development of the procurement sector, other reasons may also be important. Some of these reasons are and associated problems related to private firms, others related to the government. Unfortunately, after about 16 years, some of the problems still persist.

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<sup>36</sup> *Industrial Development in Saudi Arabia: Opportunities for Joint Ventures*, Comet report, London, 1985, p.76.

<sup>37</sup> *The Difficulties that Face Contractors on Financing their projects*, *supra* n. 32, p.13.



With regard to private firms, banks may refuse to lend to procurement contractors,<sup>38</sup> not necessarily because they think they will be unable to repay loans, but for reasons related to the financial management of these firms. Usually, before lending to a contractor, a bank will study his application and interview him. Many procurement firms, however, are not audited and do not publish their accounts in local newspapers.<sup>39</sup> Consequently, most banks are hesitant to lend money to such firms because it is difficult to assess the credit risk due to their lack of auditing information. This is a long-standing problem. However, banks, now, are requiring private firms to submit a copy of their accountant book with their loan application.

Another problem arose because the owners of private firms sought to take advantage of the funding available on easy terms from local banks and the SIDF in the early years of development plans and, as a result, established procurement firms without prior study and the necessary expertise. Moreover, in this situation, neither the SIDF nor the banks advised contractors on how to run their businesses or on financial management. In fact, this problem still exists today. Lending organisations should advise private firms on how to spend their money during the course of performing procurement contracts. One may suggest that banks and insurance companies should establish a special unit to provide financial consultancy or

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<sup>38</sup> On July 2002 *Tejarat Al-Riyadh Magazine* arranged a press conference to which members of the Procurement and Construction Department in Riyadh Chamber of Commerce were invited. Discussion centred on the future of the Saudi construction Market. Members declared that commercial banks' hesitation to give local contractors' financial guarantees to fund them had a negative impact on the development of the Saudi procurement market and was a main reason for local contractors refusing to enter the foreign procurement market to procure. *Tejarat Al-Riyadh Magazine*, Issue no. 478, July 2002, pp. 10-16.

<sup>39</sup> N. Suliman, Saudi Construction Market, *Tejarat Al-Riyadh Magazine*, Issue no. 496, January 2004, p. 58.

legal accountancy assistance to monitor the debt of procurement firms, especially inexperienced ones, to conduct feasibility studies on their projects, and to give guidance to help them manage their financial resources.

On the government side, a major problem has affected the procurement market. Since 1984, contractors have faced late payment difficulties. The major reason behind late payment is the financial distress of the government. In one case, the government delayed paying the contractor for 10 months.<sup>40</sup> In another case, it delayed for two years; the performance invoice was submitted on 20/5/1415 AH (1995) and paid by cheque no. 476496 on 11/5/1417 AH (1997).<sup>41</sup>

Under the Saudi Public Works Contract standard,<sup>42</sup> the government is supposed to pay the contract price immediately after completion of the contractor's performance, unless agreed otherwise. The most common method of payment is to pay contractors in instalments. Article 8 (b) states that: "the contractor's payment is payable to him in instalments commensurate with the progress of the work ... and the contract shall stipulate the dates and methods of the payment to the contractor". Subject to this article, the Standard of Saudi Public Works Contract requires the public authority to pay the contractor at least monthly.<sup>43</sup> However, the practice of the government differs completely from what is stipulated. It is common practice nowadays for the government not to pay the contractor on the due date. Hundreds of cases of late payment have been laid against the

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<sup>40</sup> Case no. 257 / 1 / K / dated 1405 AH (1985).

<sup>41</sup> Case no. 156 / 1 / K / dated 1419 AH (1999).

<sup>42</sup> Subject to Article 10 of the Purchasing Law, the Council of Ministers issues standard contracts for public works. Council of Ministers' Decision no. 136, dated 13 / 6 / 1408 AH (1986).

<sup>43</sup> *Ibid*, Art. 50 (b).

government and hundreds of meetings have been held with government officers to discuss this matter and request the government to pay contractors on time. A detailed explanation of the right of contractors to receive payment is provided in Ch. 8.

The Purchasing Law does not grant the contractor any specific rights with regard to late payment. At the same time, the contractor does not have the right to suspend performance of the contract. The public authority can force the contractor to continue performance of the contract. In this regard, the contractor may file a suit against the public authority to obtain compensation for default of payment. This practice has a negative influence on the procurement sector. It causes contractors to become hesitant about dealing with the government. If they decide to do so, they must have their own financial resources so they are not solely reliant on the contract payment. They may have to wait months after performance before receiving their payment. As of March 2005, there were still delays in public authorities paying contractors as agreed in contracts. This unjust practice has driven many procurement firms to bankruptcy.<sup>44</sup>

Despite the negative consequences of the financial crisis which have led commercial banks to adopt complicated procedures before lending to private firms and forced many procurement firms to leave the market, there have been some positive outcomes for both the government and private firms. The government introduced several new economic measures in the late 1990s onwards. Decisions have been made regarding to the privatisation

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<sup>44</sup> *The Best Ways to Expand the Participation of Local Workers in the Private Sector*, a paper presented to the Fourth Conference for Saudi Businessmen, Riyadh, 1409 AH (1989), p. 16.

process and the encouragement of foreign investment.<sup>45</sup> Moreover, in order to deal with rapid economic changes, the Supreme Economic Council (SEC) was established in 1999. Further, the government has enacted and revised some of its regulations, such as classifications in the Contractors' Act, the Company Act 1986, and Income Tax and *Zakaht* Act 1986, and introduced the new Accountant Act 1986, and the new Foreign Investment Act 1999. The Company Act, for example, stipulates that at the end of every fiscal year, the director of the company must prepare an inventory of the company's assets and liabilities, balance sheet, a profit and loss account, and a report showing the company's activities and financial situation during the fiscal year.<sup>46</sup>

## **II. Public Procurement Contract Regulations in the Two Legal Systems**

### **Preamble**

Saudi procurement contracts and the rules regulating them were derived from foreign experts hired by the Board of Grievances (*Diwan Al-Mazalem*) (hereafter the Board), to work together with *Sharia'h* judges to develop local administrative law. Most of these experts were from Egypt but were educated in France, and therefore adopted the main rules of Egyptian and French administrative laws in the judgements of the Board. Consequently, the leading principles of Saudi procurement contracts are derived from Egyptian administrative law, which in turn is based on French

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<sup>45</sup> Since 2002 Saudi Government has announced and implemented plans to privitise many of its vital economic sectors including telecommunication, civil aviation, desalination, highway management, railways and sport clubs.

<sup>46</sup> Company Act, Royal Decree M / 29, dated 16 / 9 / 1418, (1998) Art. 76.

law.<sup>47</sup> Accordingly, the rules of public contracts differ from those which regulate private contracts in Saudi Arabia.

Unlike Saudi procurement regulations, UK law does not distinguish between private and public contracts.<sup>48</sup> Many authors hold the view there is no special legal regime governing contracts made by a public authority.<sup>49</sup> Rather, procurement contracts are governed by general law.<sup>50</sup> Ordinary contract law regulates public contracts, which are subject to the jurisdiction of the ordinary courts. Despite this, lawmakers have recognised the characteristics of government contracts by applying some regulations and directives governed by public law.<sup>51</sup> Public authorities are required to use a standard contract. Such a contract obliges the public authority to call for tenders in certain ways and advertise tenders in particular journals. Contractors are free to negotiate and bargain with the public authority. If they agree to do the work or perform the service they must accept the conditions imposed. While contractors in private contracts also have the right to negotiate the conditions of the contract, in public contracts, the contractor has no right to modify the terms of the contract after signing it.

Moreover, under the UK rules, a public authority has no right to bind itself by contract in respect of any future action for the public good or

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<sup>47</sup> Alhudaithy, I., Historical Review of Saudi Administrative Contracts, (2002) 11 *Public Procurement Law Review*, p. 29.

<sup>48</sup> Despite this, UK government contracts apply exceptional rules similar to unusual rules in Saudi procurement contracts.

<sup>49</sup> Wade, H.W.R. & Forsyth, C. F., *Administrative Law*, (Oxford University Press, 9<sup>th</sup> Edition, 2004), p. 775. C. Turpin, *Government Procurement and Contracts*, (London, Longman, 1989), p.85, S. Arrowsmith, *The Law of Public and Utilities Procurement*, (London, Sweet & Maxwell, 1996) p. 9, and D. Harris & D. Tallon, *Contract Law Today: Anglo-French Comparison*, (Oxford University Press, 2<sup>nd</sup> Edition, 1991), p. 101.

<sup>50</sup> D. Harris, & T. Denis, *supra* n. 49, pp. 102-103.

<sup>51</sup> For example, public works contracts, supply contracts, and public services contracts.

services.<sup>52</sup> In addition, a local authority is required to contract within its statutory powers. Any contract made in excess of its powers is totally void.<sup>53</sup>

The following section will explore Public Procurement Contract Regulations under the two Procurement Systems.

### **A. Public Procurement Contract Regulations under the Saudi Procurement System**

We will first briefly consider the history of Saudi procurement laws. When King Abdulaziz entered the Hijaz region in 1344 AH (1924), he established a committee comprising citizens of the region to help manage public services and conferred on them some powers, including the power to enter into government contracts.<sup>54</sup> The terms of establishment of the committee did not identify particular contracts as government ones. Instead, they contained a general provision for "contracts with private companies to deliver public procurement".

At the same time, there was no law or regulation to govern the procurement sector. However, tenders and government purchase regulations were mentioned for the first time in the Financial Ministry Act.<sup>55</sup> After the establishment of the Financial Ministry in 1932, tenders were called for and government purchases procured through this Ministry. Article 15 gave the Finance Minister the power to provide the needs of the government. He was

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<sup>52</sup> *Rederiaktiebolaget 'Amphitrite' v. The King* [1921] 3 K.B. 500, 502-504. In fact, this rule was subject to long debate. Arrowsmith, for example, supports the view that this rule does not apply to procurement contracts. See Arrowsmith, [*supra* n. ?? 2005], p. 59.

<sup>53</sup> Wade & Forsyth, *supra* n. 49, p. 779.

<sup>54</sup> Ministry of Finance and National Economy, *The Development of the Saudi National Financial System*, Riyadh, 2000, p.7.

<sup>55</sup> Royal Decree no. 381, dated 11/4/1351 (14/8/1932).

required to found the tendering procedures mentioned in articles 45-70 of the Financial Ministry Act.<sup>56</sup>

The needs of the government increased greatly. Public works, public transportation, public maintenance, and the supply of goods became more extensive. Existing regulations did not cover every single tender procedure. Public agencies followed the regulations of the Ministry of Finance. Suppliers experienced different treatment from one agency to another. After 36 years of supplying the necessities of the government without a specific law, the Council of Ministers enacted the first Bid and Tender Act in 1968 (Tender Act hereafter).<sup>57</sup> The Tender Act contained 197 articles. It summarised most tender-related circulars and reshaped them into one unit. The Financial Ministry was given the authority to control the execution of government contracts. All government agencies were required to follow its directives. If an agency did not comply with the Tender Act, the Ministry of Finance could force it to do so; if the public agency persisted in flouting the rules, the Ministry of Finance could refer the matter to the head of the Council of Ministers. After twelve years (in 1979), the Purchasing Law (*Nizam T'amin al-Mushtaria't Al-Hokomiah*)<sup>58</sup> superseded the Tender Act. The lawmakers, however, realised that the Purchasing Law was inadequate to cover all aspects of the procurement sector. Therefore, they empowered the Finance Minister in article 13 to issue Implementing Regulations<sup>59</sup> in order to detail and describe the law. However, during the course of issuing the implementing

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<sup>56</sup> I. Alhudaithy, *supra* n. 47, p. 29.

<sup>57</sup> Bid and Tender Act, Royal Decree no. M / 6 dated February 24, 1968.

<sup>58</sup> Purchasing Law, Royal Decree no: M / 14 dated 7 / 4 / 1397 AH (1977).

<sup>59</sup> Implementation of Purchasing Regulations (Implementing Regulations), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 13.

regulations, it became evident that still more detail was needed to cover the new procedures. Thus, the Ministry of Finance issued a series of directives to explain the law.

It is therefore not only the Purchasing Law that regulates the procurement process in Saudi Arabia, there are several regulations distributed in different laws that contain rules regulating government procurement, which supplement the Purchasing Law. The principles of these laws cover only procurement contracts issued under their procedures. Some of the procurement regulations are described below:

1. The Council of Ministers consolidated many existing rules governing government procurement, scattered in the Act of the Council and in several laws and regulations. In its Act, the Council restricted jurisdiction to grant concession contracts, a type of administrative contract, exclusively to itself. The Council has the right to give any investor permission to manage and execute a public project under its responsibility and collect fees from the beneficiary. The concession contract is applied to the exploitation of natural resources, such as petroleum and minerals. The Council Act states that "no privilege is to be granted and no public resource is to be exploited without a law".<sup>60</sup>

2. Like the concession contract, the Council also exclusively restricted jurisdiction to grant public loan contracts, another type of public contract, to itself. Permission is usually given by the Council to the contracting authority before any sum is lent to a public agency, since it will cause additional debt in

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<sup>60</sup> Council of Ministers' Act, Royal Decree no. A/13 dated 3/3/1414 (1993), Art. 31.



the public budget. Article 33 states that the government is not able to sign a loan agreement without the approval of the Council of Ministers and the issue of a pertinent Royal Decree.<sup>61</sup> Moreover, the Council authorises Ministers to manage the affairs of their ministries, including the right to enter into administrative contracts.<sup>62</sup>

3. Another example of procurement regulation is the Mineral Law which applies only to contracts signed to execute mineral work.

The present study will concentrate on the Purchasing Law because it is the main law governing procurement, and most public agencies are required to follow its rules. The rights of contractors will be analysed through studying the principles of the Purchasing Law and the practice of government during implementation of its rules, its Implementing Regulations, the Standard of the Saudi Public Works Contract, and the Standard Form of the Maintenance and Operation Contract (Maintenance Contract hereafter).

Over twenty-eight years have passed since the enactment of the present Purchasing Law. Great changes in the social, economic, political and business environments have affected Saudi Arabia in particular and the world in general. However, the Purchasing Law still exists in its original form, it has not kept pace with ongoing developments in the various sectors in the country. It has serious weaknesses and, thus, is in urgent need of reform, in order to respond to the pace and extent of the challenges in both the local and international environment. The government must take serious steps to

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<sup>61</sup> *Ibid*, Art. 33.

<sup>62</sup> *Ibid*, Art. 9.

reform the procurement sector by enacting new procurement regulations and setting out a national programme to carry the reform process forward. Such reform must take into account the new national strategy which has privatised some of the public sector and plans to continue such privatisation. Also, procurement reform should reduce the power of the government as a party to the procurement contract and base the contractual principles on a commercial rather than administrative perspective. The need to reform the procurement regulations emanates from the serious loopholes in these regulations, which will be considered in forthcoming chapters.

Before concluding this section it is worth mentioning that although transparency is one of the most important characteristics of the Purchasing Law,<sup>63</sup> there are two important factors which have affected the development of the procurement sector in the country. These two factors have a strong relationship with each other. The first is the lack of procurement information, and the second is the lack of cooperation between private firms. These factors will be analysed in detail in Chapters Three and Four.

A survey published by the Riyadh Chamber of Commerce showed that contractors experience the same problems when dealing with the government.<sup>64</sup> If private firms were to cooperate with one another this could perhaps reduce such problems. Poor communication between contractors is indicative of poor management practice within their procurement firms. Contractors do not try to build a strong relationship with other contractors in

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<sup>63</sup> *Ibid*, Art. 1.

<sup>64</sup> Riyadh Chamber of Commerce, *Barriers and Obstacles which face Procurement Contractors*, A paper submitted By the Riyadh Chamber of Commerce, October 2002, p. 22.

order to counteract the prerogative power of the government. Each firm looks only for its own benefit, which puts all in a weak position. Such weakness may encourage traders, contractors, private firms and Chambers of Commerce to create in the future a procurement union to represent procurement contractors and to protect their rights.

## **B. UK Public Procurement Contract Regulations**

Unlike the Saudi procurement system, which applies only one procurement approach, namely, the traditional way of contracting in which tenders are invited and evaluated, mainly on the basis of price, successive UK governments have used procurement as a political tool to stay in office. They have promised to provide public services and utilities, and expand the public sector in general in order to encourage taxpayers to vote for them. They have used procurement as an important tool to increase the market orientation of the economy. In fact, since the 1960s, they have applied many procurement policies in civil procurement, such as Compulsory Competitive Tendering (CCT),<sup>65</sup> market testing (MT),<sup>66</sup> and Best Value for Money (BV).<sup>67</sup>

According to Leigh,<sup>68</sup> the contracting, purchasing, and employing power of local authorities has long been a political battleground. Where

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<sup>65</sup> Compulsory Competitive Tendering (CCT) was introduced in the UK by the Conservative Government throughout the 1980s, in an attempt to bring greater efficiency to local government and health services through the use of competition.

<sup>66</sup> In the early 1990s, the Labour Government introduced a policy of market testing public services in central government, testing their efficiency by exposing them to competition from external providers.

<sup>67</sup> The Local Government Act 1999 s.3(1) places on local authorities a legal duty to secure 'Best Value' in carrying out their functions; they 'must make arrangements to secure continuous improvement in the way in which their functions are exercised, having regard to a combination of economy, efficiency and effectiveness'. See S. Arrowsmith, 'The Law of Public and Utilities Procurement', p. 14. (2005).

<sup>68</sup> I. Leigh, *Law, Politics, and Local Democracy*, (Oxford, Oxford University Press, 2000), p. 279.

Labour has seen the use of power to purchase labour, supplies and materials as an opportunity to achieve secondary social goals, the Conservative party has argued that such transactions should be governed by strict market principles of value for money and efficiency. In more recent times, contract compliance has become a method for promoting equal opportunity policies. These different views regarding contracting and purchasing have generated a variety of procurement policies since the 1960s.

Various successive governments have introduced a number of different procurement approaches designed to seek reduction in cost and to fulfil a commitment to improve quality and efficiency.

Improving procurement and developing better products and services have been priority aims for British governments since the 1960s. Many procurement approaches have been developed and many reform steps taken. The fundamental aim of these approaches is to open up the competitiveness of the market place and to obtain best value for money. Different procurement approaches, aforementioned, have been introduced. In addition, apart from setting programmes for reforming public services, including partnerships with private firms to deliver public services, which have resulted in different programmes, such as the Private Finance Initiative (PFI)<sup>69</sup> programme, and Public-Private-Partnership (PPP),<sup>70</sup> British governments have set a national strategy for procurement delivered by central and local

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<sup>69</sup> In 1992, the UK government introduces the Private Finance Initiative (PFI), primarily as a means of bringing greater discipline to the procurement of public infrastructure. Under this policy, the private sector was engaged to design, build, finance and operate infrastructure facilities.

<sup>70</sup> It should be pointed out that this study will concentrate on public sector procurement contracts only, such as public works, supply, and services contracts, and will not explore other methods of procurement such as PFI, PPP, or CCT.

authorities. Local authorities, for example, spend 40 billion pounds each year providing essential services.<sup>71</sup> It has been noted<sup>72</sup> that individual purchasing decisions by over 400 separate councils, often buying the same items, means they do not take advantage of their collective buying power to negotiate lower prices or work with suppliers to develop better products and services. It has also been reported<sup>73</sup> that more than 75% of councils have no procurement strategy. Moreover, various government departments prepare supply estimates for the next fiscal year.<sup>74</sup> Accordingly, the government has set out a procurement strategy to develop the procurement sector.

The procurement strategy will assist central and local governments to plan for procurement and help achieve a balance between political needs and business priorities. The strategy has been written jointly by central and local governments and involves private suppliers. It aims to identify cutting edge experience and good practice that can be shared to deliver improvements across the procurement sector. It endeavours to establish a plan to build skills and competencies, engaging council members in procurement at a strategic level and securing a long-term focus on strategic procurement.<sup>75</sup>

Local authorities are responsible for delivering the strategy. However, central government will provide support, guidance, and encouragement to assist authorities. In contrast, neither Saudi ministries nor their branches have a national strategy or clear plan to develop public procurement.

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<sup>71</sup> Office of the Deputy Prime Minister, *National Procurement Strategy for Local Governments*, 2003-2006, October 2003, p. 15.

<sup>72</sup> I. Byatt, *Delivering Better Services for Citizens Report*, London, October 2003, p. 7.

<sup>73</sup> National Procurement Strategy, *supra* n.71, p. 4.

<sup>74</sup> *Ibid*, p.8.

<sup>75</sup> National Procurement Strategy, Press Release, Wednesday, 29 January 2003, p.1.

In fact, prior to the adoption of EC procurement directives in 1991, UK procurement had no special legal regime regulating the contracts of public agencies. Instead, local authorities' Acts regulated such contracts.<sup>76</sup> There were also government guidelines on contract awards, but these did not grant rights to tenderers.<sup>77</sup> The situation has changed since the UK government adopted EC procurement directives. In practice, EC procurement directives have had a great influence on UK procurement regulations. "Much of the legislation applying to procurement in the United Kingdom derives from European Community law and relates to the community's policy of opening procurement markets to EC-wide competition".<sup>78</sup> In fact, UK regulations are an identical copy of EC Procurement Directives and affected by new EC economic and procurement developments. The implementation of EC Directives in the UK took place through the adoption in entirety of Council Directive 71/305/EEC<sup>79</sup> concerning the coordination of procedures for the award of a 'public works contract'<sup>80</sup> as amended by Council Directive 89/440/EEC.<sup>81</sup> Consequently, EC Directives have become an integral part of national legislation, enjoying a legally binding status. Remedy against any violation of the provisions of EC Directives is the same as that existing for infringements of national rules.<sup>82</sup>

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<sup>76</sup> Local Government Act (c. 70) 1972 and Local Government Act (c. 9) 1988.

<sup>77</sup> D. Pachnou, *Bidders' Remedies to Enforce EC Procurement Rules in England and Wales*, (2003) 12 *Public Procurement Law Review*, p. 35.

<sup>78</sup> S. Arrowsmith, *supra* n. 49, p.45.

<sup>79</sup> Public Works, Explanatory Note. The same wording appears in Supply regulations, Explanatory Note, OJ No. L199, 9.8.93, p. 1. and Services regulations, Explanatory Note, OJ No. L209, 24.7.92, p. 1.

<sup>80</sup> OJ No. L185, 16.8.71, p. 5.

<sup>81</sup> OJ No. L210, 21.7.89, p. 1.

<sup>82</sup> It should be noted that EC procurement directives are not directly applicable in EC Member States but are binding upon them as to the result to be achieved, according to Article 249(3) (ex 189(3)) EC

The first two measures to be adopted <sup>83</sup> were the Public Works Directive 71/305<sup>84</sup> and Public Supply Directive 77/62,<sup>85</sup> which came into effect in the United Kingdom by way of Ministry circulars in 1973 and 1978, respectively". In addition, the Services Directive 92/50, and Utilities Directive 90/53<sup>86</sup>, later replaced by directive 93/38, were implemented in the United Kingdom by the Utilities Contracts Regulations 1996.<sup>87"</sup>

From 2006, local government public procurement in the EU will be governed by the new Public Sector Procurement Directive. The European Parliament and EU Council of Ministers have reached agreement on a legislative package aimed to simplify and modernise the EU's public procurement sector directives. Council Directive 2004/18/EC,<sup>88</sup> the new Public Sector Procurement Directive, and 2004 /17/EC,<sup>89</sup> the new Utility Directive, were adopted on 31 March, 2004, and Member States had until 31 January 2006 to implement them. Directive 2004/18/EC consolidates existing Supplies, Services and Works Directives into one simplified Directive and also takes account of modern procurement methods and development in best practice.<sup>90</sup> Moreover, contracting authorities should take social and environmental

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Treaty. Thus, when implementing EC procurement directives, Member States must ensure that their national procurement rules comply with the regime established by these directives. See H. Prieb and C. Pitschas, Secondary Policy Criteria and their Compatibility with E.C. and WTO Procurement Law: the Case of the German Scientology Declaration, (2000) 9 *Public Procurement Law Review*, p.173.

<sup>83</sup> I. Harden, Defining the Range of Application of Public Sector Procurement Directives in the United Kingdom, (1992) 1 *Public Procurement Law Review*, p.362.

<sup>84</sup> Works Directive, 71/305, [1971], O.J.L. 185/5.

<sup>85</sup> Supplies Directive, 77/62, [1977], O.J.L. 13/1.

<sup>86</sup> Utilities Directive, 90/53, [1990], O.J.L. 297/1.

<sup>87</sup> The Utilities Contract Regulations, 1996, no.2911.

<sup>88</sup> O.J. 2004, L 134/114.

<sup>89</sup> O.J. 2004, L 134/1.

<sup>90</sup> S. Arrowsmith, "An Assessment of the New Legislative Package on Public Procurement", (2004) 41 *Common Market Law Review*, p. 1277.

criteria into account when awarding contracts.<sup>91</sup> The text of the new Directive will require companies which have not complied with EU legislation in economic, social or environmental fields to be excluded from the tendering process.<sup>92</sup>

Implementation of the EC procurement directive requires the UK to eliminate any barriers which might prevent any contractor registered with any Member State from participating in the UK procurement Market. Also, the UK must provide equal treatment to EC contractors and treat them like UK contractors. Article 13(8) of the Works, Supply, and Services Regulations obliges the contracting authority to provide equal treatment to all EC contractors, regardless of their nationality or the place of establishment of their entities.<sup>93</sup>

"The UK is also a member of the Government Procurement Agreement of the WTO (GPA). Consequently, the GPA is deemed part of UK procurement regulations since its requirements are implemented in EU Directives.<sup>94</sup> According to Article XXIV.5 of the GPA, each signatory government is required to accept or accede to the agreement to ensure conformity with its laws,

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<sup>91</sup> K. Weltzien, "Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity: Scope of the Procurement Directives in the Classical Sector", (2005) 5 *Public Procurement Law Review*, p.237.

<sup>92</sup> J. Schnitzer, "The External Sphere of Public Procurement Law: Bi-Regional Trade Relations from the Perspective of the European Community", (2005) 2 *Public Procurement Law Review*, p.63.

<sup>93</sup> Public Works, Public Supply, and Public Services Regulations, *supra* n., Art. 13 (8).

<sup>94</sup> There has long been debate regarding the effectiveness of international agreements on the domestic legal systems of countries. Some countries recognise the possibility for international agreements to have a legal effect on domestic law, while, in some countries, international agreements do not have a direct effect on local legislation. On this issue, see S. Arrowsmith, 'Government Procurement in the WTO' (London, Kluwer Law International, 2003, v. 16), p. 43, and Cottier and Schefer, 'The Relationship between World Trade Organisation Law, National Law and Regional Law' (1998) 1 *Journal of International Economic Law* 83.



regulations, and administrative procedures.<sup>95</sup> The GPA requires its signatories to open up their procurement market and guarantee easy access to public procurement. This obliges GPA members to treat the products and services of other parties to the agreement no less favourably than their own national products and services.<sup>96</sup> Additionally, it obliges the UK to prohibit any discriminatory practice against GPA contractors.”

One can infer from the prohibition against discrimination clauses and transparency requirement in EC procurement directives and GPA provisions that UK contracting authorities risk litigation if they show preferential treatment to UK contractors or if they adopt any decision which hinders opening up of the procurement market. Its obligations have forced the UK government to take serious steps, such as adopting a national procurement strategy, helping small size firms, etc, to develop its procurement sector in order to compete with EC and GPA contractors. It is also under an obligation to update its scientific methods of performance, particularly in the construction sector and train procurement officers and workers in order to develop the management of procurement firms.

This thesis will discuss and analyse the rights of tenderers and contractors in the above procurement regulations, public works, supply regulations, and services regulations. It will also refer to utilities regulations where appropriate.

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<sup>95</sup> GPA, Uruguay Round Annex 4: Plurilateral Trade Agreements, April 15, 1994 Government Procurement Agreement (GPA), GATT, available on <http://www.wto.org> and LEXIS,GATT file, Art. XXIV.5. It should be noted that Article XVI.4 of the WTO similarly requires each member to repeal or amend any national legislation contrary to the requirements of the WTO agreement.

<sup>96</sup> *Ibid*, Art. III (1).

## **Summary**

This chapter has presented a background account of the development of Saudi procurement regulations through exploring the development of the local procurement sector. The Saudi procurement sector has developed very rapidly over successive development plans to become one of the most productive and rapidly expanding economic sectors in the country. In contrast, in the UK, the government's long term goal is to deliver high quality public services through sustained increases in investment and reform to deliver efficient and responsive services which meet public expectations throughout the country.

Rapid development and global economic changes have had various influences on the development of the Saudi procurement market and Saudi procurement regulations, and this development has not been without problems. This chapter has explored some of the problems that have a significant influence on local procurement firms, such as financial problems and difficulty in obtaining funds.

This chapter has also provided an overview of the laws and regulations which regulate the procurement sector in the two countries. While UK procurement regulations influenced by EC procurement directives and the GPA require the UK to eliminate any obstacles which might prevent any EC tenderer or contractor from entering the UK procurement market, Saudi procurement regulations have not kept abreast of the rapid development and changes in local and world economies. In fact, more than twenty five years

have elapsed without any changes to or development in Saudi Purchasing Law.

The next chapter will investigate the principles of public procurement contracts.

## **Chapter Three**

### **Characteristics of Public Contracts**

## **Chapter Three: Characteristics of Public Contracts**

### **Preamble**

This study, as indicated in its title, will explore the rights of tenderers and contractors under Saudi and UK public procurement contract regulations. It is therefore important to explain the characteristics features of public contracts. This part of the thesis will focus on the contracting authority's role to supervise and control the performance of the contract, especially under Saudi regulations.

In general, a contract between the government and a private firm may be classified as either a public contract or an ordinary civil law contract. An ordinary civil law contract is governed by private law principles, which include mutual consent of the parties concerned to the conditions of the contract. An ordinary court has jurisdiction over any contract dispute. The government in a private contract stands on an equal footing with the other party to the contract in respect of private law principles. Each party is free to negotiate the terms of the contract and modify them. The government does not have the right to unilaterally amend or terminate such contract.

A public contract is similar to a private contract as regards formation, expiry, and effects upon involved parties. However, a public contract is governed by public law principles,<sup>1</sup> and its terms and conditions differ in nature from those of a private contract. For example, in a public contract the contracting authority has the power to penalise the other contractor if he breaches his contractual

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<sup>1</sup> C. Dadomo and S. Farran, 'French Substantive Law', (London, Sweet & Maxwell, 1997), p. 162.

obligations even if the conditions of the public contract do not include this right. Such right do not exist in a private contract. Further, when a contracting authority terminates the public contract before its due date in the public interest. In contrast, under a private contract, neither party has the power to terminate the contract before its due date without the consent of the other party.

The public authority, as one of the parties, deals with the other party as both a contractor and a political entity. The latter characteristic allows the government to use its sovereignty to control the contract's execution. It thus possesses exclusive authority to grant or deny a private party the right to provide public services. In addition, a procurement contract resulting from competitive tendering possesses a number of distinct features, such as detailed and extensive formulation of plans and allocation of roles, elaborate provisions governing task variation, inspection, monitoring, defaults, penalties, dispute resolution, payment, performance, and precise specification of audit and accounting procedures.<sup>2</sup>

This chapter will explore the characteristics of public contracts by (1) determining the public character; (2) defining their elements; and (3) investigating some types of public procurement contracts.

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<sup>2</sup> P. Vincent-Jones and A. Harries, "Limits of Contract in Internal CCT Transaction: A Comparative Study of Buildings' Cleaning and Refuse Collection in a Northern Metropolitan", in Campbell and Vincent-Jones (eds.), *Contract and Economic Organization: Sociolegal Initiatives (1996)*.

## **I. Determination of the public character of a contract**

It should be pointed out that in the Saudi context, public contracts are governed by the principles of administrative law. The rules governing Saudi public contracts, as explained in chapter eight, were derived from foreign experts hired by the administrative court, the Board of Grievances (*Diwan Al-Mazalem*) (hereinafter the Board), to work together with Sharia'h judges to develop local administrative law. Most of these experts were from Egypt and educated in France. They transferred the main rules of Egyptian and French administrative law to the judgements of the Board. Consequently, the leading principles of Saudi public contracts are derived from Egyptian administrative law, which in turn is based on French law.<sup>3</sup>

As in French administrative law,<sup>4</sup> there are two ways to determine the public character of a contract: when the law specifies some contracts as public, and when the court decides on a contract's public character.<sup>5</sup> Each is discussed below.

### **1. Public contract by legislation**

One of the aims of a public authority is to serve the public's interest, therefore, contracts serving the public interest are designated public contracts by law-makers.

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<sup>3</sup> Alhudaithy, I., Historical Review of Saudi Administrative Contracts, (2002) 11 *Public Procurement Law Review*, p. 29.

<sup>4</sup> C. Dadomo and S. Farran, *supra* n. 1, p. 79.

<sup>5</sup> I. Alhudaithy, *supra* n. 3, p. 10

Such contracts differ in character from private contracts. For example, a public works contract is, by nature, performed to benefit the public. Its purpose is to help the public authority provide public services for the society. When a public authority contracts for the construction of a bridge or road, it is contracting on behalf of the society. The aim is not to obtain commercial profits from the project, but rather to help meet the needs of the people. Therefore, law-makers specify such contracts as public contracts.

The following section will give an overview of the development of Saudi procurement laws.

When King Abdulaziz entered the Hijaz region in 1344 AH (1924), he established a "Committee of the Region's Citizens" (The Committee, hereinafter) to help manage public services and conferred on them the power to enter into government contracts.<sup>6</sup> The Committee had the right to "contracts with private companies to deliver public procurement". Later on, in 1968, the government enacted a specific act for the purchasing sector called the Bids and Tenders Act<sup>7</sup> ('Tenders Act' hereinafter). The Tenders Act defined some contracts, such as public works, supply of goods and services for government, and concession contracts, as administrative contracts and they are regulated by the provisions of

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<sup>6</sup> Ministry of Finance: the Development of the Saudi National Financial System, *Ministry of Finance*, 2000, p.7.

<sup>7</sup> Bids and Tenders Act (Tenders Act), Royal Decree no: M / 6 dated 24 / 2 / 1386 AH (1968).



the Act.<sup>8</sup> Many changes in procurement regulations have taken place since those early times to the present Purchasing Law<sup>9</sup>.

## **2. Contracts Classified by the Board as public**

In order to fulfil its duties, a public authority may sign different types of contract. Sometimes the nature of a contract does not classify it as either public or private. Therefore, the court is empowered to decide whether a contract is public or private if its characteristics do not clearly identify it as one or the other.

As the government's functions developed between the 1960s and 1980s, due to an expanding economy, increasing disputes among private contractors and between private contractors and public agencies forced the government to develop its administrative role. The Board of Grievances was given power to define some contracts as public to meet society's needs. Such contracts involve public agencies inviting private parties to fulfil public needs. Contracts classified by the Board as public include leasing contracts between a private party and a public authority<sup>10</sup> or loan contracts between the Agriculture Bank and its customers.<sup>11</sup>

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<sup>8</sup> Tenders Act, *supra* n. 7, Arts. 25, 26, 29, 33.

<sup>9</sup> Purchasing Law, Royal Decree no: M / 14 dated 7 / 4 / 1397 AH (1977).

<sup>10</sup> Case no. 13/ T / 3/ K dated 1411 AH (1991), Case no. 21/ T / 3/ K dated 1410 AH (1990), Case no. 14/ T / 1/ K dated 1412 AH (1992).

<sup>11</sup> Case no. 85/ T / 3/ K dated 1411 AH (1991), Case no. 126/ T / 3/ K dated 1411 AH (1991).

## **II. Elements of Public Contracts**

As aforementioned, there is no formal criterion to distinguish public contracts from other contracts. However, a combination of legislation and court decisions has established three guiding principles to classify a contract as a public one:

The Board <sup>12</sup> states that

"Public contracts are distinguished from private contracts in that, because of their importance (for example, the need for the public services which the public contract aims to provide), the public benefit is favoured over that of the private individual. The two contracting parties in a private contract aim to realise material and private interest. It is different in a public contract, since the government does not pursue its own private interest but contracts for the public benefit. These contracts are concerned with public services which must operate efficiently and on time."

In addition, the Consultant Department clarified that

"A public contract differs in nature from a private contract. It is entered into between a public legal person, and a private contractor. The aim of the contract is to provide a public benefit. The legal rights of both contractors are not equal because the public benefit causes the public party to have precedence. The private contractor must know and accept these privileges before signing the contract ".<sup>13</sup>

For these reasons, the government is given wide rights and powers. For example, the government has the right to lay down the conditions and terms of tenders, irrespective of the other contracting party's consent. Anyone who wishes to enter into a contract with it, must accept these conditions.

A contract is deemed to be public when:

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<sup>12</sup> Case no. 460 / K dated 1396 AH (1976).

<sup>13</sup> Consultation no. 637, dated 23/10/1956, Section of Consultation, see S., Al-Tamaui, 'General Principles of Administrative Contracts', (Cairo, Dar Al-Feker Al-Arabi, 5<sup>th</sup> Edition, 1991), p. 60.

1. One of the parties is a public authority.
2. It contains conditions unusual in private contracts.
3. The objective of the contract is to provide a public benefit.

### **1. one of the parties is a public authority**

In order to distinguish between public and private contracts, jurists usually stipulate that a public authority is a party to a public contract. The definition of a public authority under Saudi procurement law and cases and under English regulations is complex.

Neither Saudi administrative law, nor the Board, has defined the term "public authority". However, the term 'government' in the Basic Law <sup>14</sup> refers to all branches of the government, judicial, executive, and legislative.<sup>15</sup> The Basic Law divides the functions of the government into three branches: legislative, executive, and judicial. It emphasises that each branch must be kept separate from other branches.<sup>16</sup> It empowers the Council of Ministers as the executive

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<sup>14</sup> Until 1992, Saudi Arabia was governed without a written constitution. In his speech to Saudi citizens promulgating the Basic Law of the Government on March 1, 1992, King Fahad stated that 'our constitution in the Kingdom is the book of God, which is immune from any futility, and the traditional system of His messenger, who does not speak irresponsibly. Whatever we disagree on we refer back to them and they are the arbiters on all statutes issued by the state. In its present, as in its past the Kingdom is committed to the law of God [Sharia'h]'. According to the King, the reasons for the reform emanated from the fact that "momentous events in the recent past have made it necessary to develop the administrative structure". Also, to "strengthen something that exists and formulate something which is already in operation."

The Basic Law lays down certain principles relating to the state in eighty-three Articles. Grouped in nine chapters it deals with the basic law of the government, the system of the government, the features of the Saudi family, and the financial affairs of the state. More details can be found in Aba-Namay, *The Constitution of Saudi Arabia: Evolution, Reform and Future Prospects*, a Ph.D. thesis submitted to the University of Wales, Aberystwyth, 1992.

<sup>15</sup> Basic Law of the Government (Basic Law), Royal Decree no: A/90 March 1, 1992, Art. 44.

<sup>16</sup> *Ibid*, Arts. 44, 46, and 67.

authority<sup>17</sup> and point of reference for financial and administrative affairs in all ministries and other governmental bodies.<sup>18</sup> The Basic Law recognises two types of public authorities, corporate bodies and those which receive state funding. The latter refers to the ministries and their branches, while the former refers to public corporations which are not regulated by Acts of the Council of Ministers.<sup>19</sup> Such corporations are public bodies which obtain their budget from the public budget and whose laws and regulations are enacted by procedures similar to those which establish ministries.

Under the Basic law of the government, the King has two roles: as president<sup>20</sup> and as head of the Council of Ministers.<sup>21</sup> To exercise his roles, he has almost complete power to direct the country.<sup>22</sup> He has power over all administrative, legislative, and executive authorities in the country.<sup>23</sup> The king, as chairman of the Council of Ministers, steers the overall policy of the state.<sup>24</sup> The Council has full control over executive and administrative affairs. Therefore, it has the power to create and organise public services.<sup>25</sup>

Lack of a precise definition of a 'public authority' has stimulated researchers to attempt the task of definition. Jurists have studied the characteristics of public authorities and produced a reasonable definition of

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<sup>17</sup> *Ibid*, Art. 56.

<sup>18</sup> Council of Ministers Act, Royal Decree no. A/13 dated 3/3/1414 (1993), Art. 19.

<sup>19</sup> Such as universities (all universities in Saudi Arabia are government owned), General Presidency for Girl's Education, and Grain Silos & Flour Mills Organisation.

<sup>20</sup> Basic Law, *supra* n. 15, Art. 55.

<sup>21</sup> *Ibid*, Art. 56.

<sup>22</sup> I., Alhudaithy, *supra* n. 3, p. 5.

<sup>23</sup> Basic Law, *supra* n. 15, Art. 44.

<sup>24</sup> The Council of Ministers Act, *supra* n. 18, Art. 29

<sup>25</sup> *Ibid*, Art. 24(2).

them. Thus, one jurist defines a public authority as "a body administered and financed by the government in order to provide public benefit".<sup>26</sup> This definition contains three elements.

- A. A body is administered by the government
- B. A project is financed by the government, and
- C. The function of such a project is to supply public services.

Many questions are raised regarding private institutions which receive government funds or subsidies, or are controlled by a public authority. Are they public or private institutions?

In general, private institutions are not governed by public law. Despite this, some private bodies possess some characteristics of public entities. Therefore, Saudi laws apply two criteria to identify some private entities as public entities as follows:

First, part of the budget of the private entities must be financed by the government. In addition, the private entities must exercise some public functions. However, legal entities governed either by public or private law are excluded from this condition if they are industrial or commercial entities.

Second, private entities must apply Purchasing Law regulations in their procurement contracts. Private entities must follow and apply Purchasing Law procedures in order to be treated as public entities.

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<sup>26</sup> S. Haikal, *Saudi Administrative Law*, (Riyadh, King Saud University Press, 1995), p.77.

In contrast, in UK administrative law, the term "government" applied in a contract is clearer in meaning; it usually refers to central government which is conducted by ministries and their branches, headed by the Prime Minister. The definition under procurement regulations includes, besides public authorities listed in the regulations, non-commercial public bodies not expressly listed, and joint associations involving the participation of certain bodies listed in the regulations.<sup>27</sup> The cases of the *National Union of Teachers v. Governing body of St. Mary's Church of England (Aided) Junior School*<sup>28</sup> and *Foster v. British Gas Plc.*<sup>29</sup> provide a basic formula for the definition of a public authority, as an emanation of the state; it can be defined as a body that has been made responsible, pursuant to a measure adopted by the state, for providing a public service that is under the control of the state and which exercises special powers for the purpose, beyond those which operate between individuals. In the light of this concept, UK procurement regulations use the term 'contracting authority' to refer to public entities. They define a 'contracting authority' in article 3 of Works, Supply and Services regulations. Indeed, the definition of a contracting authority under Works, Supply and Services Regulations, as follows:<sup>30</sup>

- (i) Established for meeting general public needs, not having an industrial or commercial character;
- (ii) Having legal personality; and

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<sup>27</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement*, (London, Sweet & Maxwell, 1996) p. 107.

<sup>28</sup> *National Union of Teachers v. Governing body of St. Mary's Church of England (Aided) Junior School* [1997] 3 C.M.L.R. 630.

<sup>29</sup> *Foster v. British Gas Plc.* [1991] 2 A.C. 306.

<sup>30</sup> N. O'Loan, "United Kingdom: Implementation of the Works, Supplies and Compliance Directives", (1992) 1 *Public Procurement Law Review*, p.89.

- (iii) Financed, managed or controlled by the state, regional or local authorities or other bodies governed by public law.<sup>31</sup>

The regulations exclude bodies of an "industrial or commercial character". Industries and commercial bodies are not therefore public authorities in the light of the regulations, even if they help to provide services on behalf of a public person. On the other hand, these bodies remain constitutionally part of the government departments listed in Article 3(1)(b) of the regulations.<sup>32</sup> In addition, it seems that the regulations attempt to include all UK bodies which are governed by public law or which have a strong relationship with government agencies, as public authorities. Article 3(1)(r) provides a framework for defining any body "financed wholly or mainly by a contracting authority" or subject to management supervision by another contracting body<sup>33</sup> as a 'public authority'.

However, the European Court of Justice (ECJ) set forward some restrictions in the case of *Regina v. Her Majesty's Treasury, Ex part University of Cambridge*,<sup>34</sup> detailing the financial obligations of the contracting authority. It held that the percentage of public financing of a particular body provided by the contracting authority must exceed 50 per cent and all its sources of income, including those resulting from commercial activities, must be taken into account. The court also stipulated that the calculation necessary for determining whether a body is a contracting authority has to be made every financial year, even if

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<sup>31</sup> M. Lewis, " Works, Supplies and Services Contracts: Coverage of United Kingdom Contracting Authority and Entities", (1995) 4 *Public Procurement Law Review*, p. 137.

<sup>32</sup> *Ibid*, p. 367.

<sup>33</sup> Public Supply Contract Regulations (Supply Regulations), 1995, no. 201, Art. 3 (1)(r).

<sup>34</sup> *Case C-380/98 Regina v. Her Majesty's Treasury, Ex part University of Cambridge* [2000]1 W.L.R. 514.

such a calculation is then only provisional; and that if a body is a contracting authority on the date that a procurement procedure begins, it retains that status, so far as that procurement is concerned, until completion of the procedure for that procurement, even if changes in that body's financing occur during the course of the procedure.

Another restriction was imposed by the ECJ in *Beentjes v. Netherlands*.<sup>35</sup> The Netherlands government decided that a public body has to be listed in Annex I of the EC Public Works Directive or has to be a local authority in order to be covered by the EC procurement Directive. The ECJ rejected this decision, and held that the issue is not whether a body is formally part of the State. A body's composition and functions are laid down by legislation and the appointment of its members depends on the public authorities. The financing of the public works contract must be viewed as falling within the state's responsibility for the purpose of procurement directives.<sup>36</sup>

## **2. The contract contains unusual conditions**

This element is the cornerstone of public contract law. It gives it a unique character that does not appear in any other contract. The word 'unusual' means that these conditions are never found in private contracts. They emanate from the political authority of the public body. They are also closely connected with public law and public services' requirements such that it is appropriate that

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<sup>35</sup> Case 31/87 *Gebroeders Beentjes v. State of the Netherlands* [1988] ECR 4635.

<sup>36</sup> *Ibid*, p. 4655.



courts most experienced in these matters should be called upon to interpret them.<sup>37</sup> When the government enters into a private contract, it does so on an equal footing with the other contractor. In contrast, when entering into a public contract it has a dual role. It contracts as a contracting party and as a political entity. It contracts on behalf of the society. Therefore, it has the responsibility to arrange for public works to be carried out, to supply goods and services to the society, and to operate and maintain such procurement.

There is no definition of 'unusual conditions' found either in French, Egyptian, or in Saudi administrative law.<sup>38</sup> M. Pequignat defined them as those which confer on the contractor some privilege of the administration.<sup>39</sup> Professor Badaui defined unusual conditions as those which imply some features of a public authority.<sup>40</sup> According to Professor Tamaui, unusual conditions exist when certain prerogatives are granted to a contracting authority and which give it some privileges not given to the other party.<sup>41</sup>

In order to provide procurement, it has been recognised by jurists that a public authority must have unusual power. This power gives the public authority predominance over the other party. French jurists call this power the doctrine of necessity.<sup>42</sup> The doctrine aims to ensure the continued provision of public services. Therefore, the public authority is given unusual power when contracting

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<sup>37</sup> J. Mitchell, *The Contracts of Public Authorities*, 1954, p.176.

<sup>38</sup> K., Al-Jumah, Arab State Contract Disputes: Lessons from the Past, *Arab Law Quarterly*, Vol. 6, Pt 1, 2002, p. 280.

<sup>39</sup> J. Mitchell, *supra* n. 37, p.176.

<sup>40</sup> S., Badaui, *General Theory of Administrative Contracts* (Cairo, Al-Nahdah Publication, 2<sup>nd</sup> edition, 1976), p.103.

<sup>41</sup> S. Al-Tamaui, *supra* n. 13, p. 93.

<sup>42</sup> *Ibid*, p. 497.

in public contracts, in order to avoid any negligence in providing such services on the part of contractors.

The nature of these conditions differs from those applicable in private contracts. Their object is to confer rights or impose obligations upon the parties to the contract.<sup>43</sup> It is this formal feature, and not the actual content of the contract, which puts the contract in the administrative category.<sup>44</sup>

The nature of the contractual clauses and the degree of participation in the service are placed side by side as of equal importance in determining the character of the contract.<sup>45</sup>

The *Egyptian Conseil d'Etat* has linked the unusual conditions with the exclusive rights and power accorded to the public authority, such as the public authority's right to supervise and direct the performance of the contract and the unilateral right to modify it. Most important are those conditions which empower the public authority to inflict penalties on contractors.<sup>46</sup>

Although this condition is one pillar of the public contract in French law, the Saudi government has expanded the use of unusual conditions. The Purchasing Law contains many provisions which empower the government with privileges over the other party. Examples of such conditions appear in the authority of the government unilaterally to modify<sup>47</sup> or rescind<sup>48</sup> the contract. It

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<sup>43</sup> L. Brown and I. Phil, *French Administrative law*, (Oxford, Clarendon Press, 4<sup>th</sup> Edition, 1993), p. 138.

<sup>44</sup> B. Dickson, *Introduction to French Law*, (London, Pitman Publishing, 1994), p. 76.

<sup>45</sup> Mitchell, *supra* n. 37, p.178.

<sup>46</sup> *Case on 25 March 1963, Year 8, Jud. Art. 116.*, p.1225.

<sup>47</sup> Implementation of Purchasing Regulations (Implementing Regulations), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 25.

<sup>48</sup> *Ibid*, Art. 29.

has power to extend the contract deadline<sup>49</sup>, to terminate the contract before the due date<sup>50</sup>, to penalise the contractor<sup>51</sup>, to perform the contract at the contractor's expense if he defaults in his performance,<sup>52</sup> to bar the contractor from taking tools away, equipment and materials which are on the site to use to complete the work.<sup>53</sup>

Many criticisms have been raised regarding the Purchasing Law and the great power of the government. Contractors, traders, banks, and the Chamber of Commerce have complained to the Finance Minister, to the Public Works Minister, and to the Council of Ministers, that they cannot survive with such provisions. The Public Administration Institute called for a conference to discuss various opinions about public contracts in the country. The conference was held on 11/5/1410 AH (1989). Individual contractors, the Chamber of Commerce, the Finance Ministry, the Board of Grievances, and the Board of General Auditors all participated. Each party submitted its opinion on the Purchasing Law. At the end of the conference, many recommendations were proposed but, to-date, none has been implemented.

At the conference, the Ministry of Finance admitted that the Purchasing Law in general and the Standard Contract for Public Works in particular has

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<sup>49</sup> Purchasing Law, *supra* n. 9, Art. 9 (b).

<sup>50</sup> *Ibid*, Art. 9 (a).

<sup>51</sup> *Ibid*, Art. 9 (a).

<sup>52</sup> Implementing Regulations, *supra* n. 47, Art. 29.

<sup>53</sup> *Ibid*, Art. 33.

many contrary provisions and some provisions conflict with some commercial laws and regulations.<sup>54</sup>

The underlying purpose of unusual conditions is to enable the public authority to continue providing services for the people. However, the government's arbitrary expansion of this exercise of power distorts the intention of these conditions. An example of such distortion is an instance when the government did not pay the contractor and at the same time forced him to continue execution of the work.<sup>55</sup> Another was when it rescinded the contract and contracted with a different contractor to perform the contract at the expense of the original contractor, because he had refused to continue execution of the contract in protest against a unilateral decision by the government agency to change the place of the contract.<sup>56</sup>

Finally, it should be noted that a public authority must not modify the price of the contract without the assent of the other party. It may modify the conditions of the contract in such a way as to promote best performance of the project, for example, to change specifications to more modern or developed ones. However, such modification must not affect the contractor financially.<sup>57</sup>

In contrast, there are some special terms, 'break clauses', in UK public contracts that assist the contracting authority to apply the public law in its

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<sup>54</sup> The Conference of Administrative Contract, the Ministry of Finance's Paper, (Institution of Public Administration, Riyadh, 11/4/1410 AH (19 80)) p. 131.

<sup>55</sup> *Case No. 215 / T / 1 dated 1418 AH (1988)*. Chapter 7 will explore this issue in detail.

<sup>56</sup> *Case No. 241 / K / dated 1396 AH (1976)*. This happened when the contracting authority penalised a negligent contractor. This study will not discuss the right of the authority to punish its procurement contractors.

<sup>57</sup> *Case no. 257 / 1 / K dated 1405 AH (1985)*.

private contracts. As mentioned above, UK law does not make any distinction between public contracts and private contracts. UK contracts are regulated by private law and are subject to the ordinary law courts. Notwithstanding, the public works, supply, and services' contract regulations contain special terms constructed to vest certain powers in the government over the other party to the contract. Such terms give the contracting authority certain unilateral powers in procurement contracts.

The motive for the establishment of these clauses is to keep public contracts flexible. Without such clauses the government would either have to accept delivery of stores no longer needed or to terminate contracts prematurely, thereby exposing itself to claims for damages, including claims for loss of profit.<sup>58</sup> Break clauses allow unilateral extension of the contract.<sup>59</sup> In addition, they give the contracting authority the right to change the specifications unilaterally. Because the contractor is required to specify all technical specifications in the contract document, any changes in specifications is subject to implied limitations, only amendments allowed are those within the scope and objectives of the original agreement.<sup>60</sup> Finally, 'break clauses' permit cancellation without change where the contract is wholly executory. They permit the government to

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<sup>58</sup> W. Asworth, *Contracts and Finance*, (London, Longman, 1953), p. 59.

<sup>59</sup> The Public Works Contract Regulations 1991 (Works Regulations), no. 2680, Art. 10 (3) and The Public Supply Regulations (Supply Regulations), 1995, no. 201, Art. 10 (4).

<sup>60</sup> C. Turpin, *Government Procurement and Contracts*, (London, Longman, 1989), p. 187.

terminate the contract at any time by notice to the contractor and provide for the contractor to be indemnified in respect of work in hand and liabilities incurred.<sup>61</sup>

### **3- The objective of the contract is to provide a public benefit**

One function of government is to provide public services. It is required by the constitution to carry out social and political objectives. Its role is to provide such services in a non-commercial manner, therefore, it is bound to do so irrespective of commercial profit. The law confers on the authority power in contracting different from the power of the private contractor. Four principles govern public services: the principle of continuity, equality, adjustment, and priority.<sup>62</sup> Each person has the right to benefit from such services.

Compared with a private contract, a public contract has a unique characteristic in respect of the performance of the contract and the public interest.<sup>63</sup> The public interest must prevail over the private interest, even to the extent of overruling the express terms of the contract.<sup>64</sup>

The term 'public service' implies the production of benefits for the people. The Purchasing Law does not define it. One obvious defect of the Purchasing Law is the absence of definitions as discussed in chapter five, section A. In addition, the overlapping of objectives of Saudi public contracts further vagueness to the provisions of the Purchasing Law.

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<sup>61</sup> *Ibid*, p.107.

<sup>62</sup> B. Dickson, *supra* n. 44, p. 69.

<sup>63</sup> *Ibid*, p.69.

<sup>64</sup> L. Brown and I. Phil, *supra* n. 43, p. 193.

Traditionally, a 'public service' must meet two conditions. Firstly, it must be owned by a public authority and not belong to private citizens. Secondly, people cannot be excluded from certain benefits such as a service provides. A public authority provides public services to everyone in society, not only to those who benefit directly. Everyone has the right to benefit from services provided by a public authority or on behalf of it. Roads, bridges, health centres, schools, airports, public transport and courts are examples of public services. Beneficiaries may pay for public benefits collectively rather than individually. People have the right to benefit from these services equally. They will not necessarily have more services if they pay more. Even those concessionary services where the concessionaire is given the right to operate the project and collect money from users are still public services controlled through the public authority.

Similar to Saudi Purchasing Law, UK Public Services Contract Regulations do not regulate every type of service. They do not cover public works contracts, public supply contracts, and contracts of employment.<sup>65</sup> Although the aforementioned regulations regulate services, they contain no specific definition of 'public services'. Instead, as indicated in the next section, some services' activities are listed in Schedule 1, Parts A and B of the regulations, while other services are covered implicitly by other regulations. For example, building maintenance is not covered by work rules, but appears to be subject to limited regulations as a non-priority (part B) service under the category of other

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<sup>65</sup> Public Services Contract Regulations (Services Regulations), 1993, no. 3228, Art. 2 (1) (a,b,c,d,e).

services.<sup>66</sup> A contract which involves supply and installation is deemed a supply contract if the supply value exceeds that of the installation. The installation service in this case is covered by public supply regulations.

### **III. The Subject Matter of Public Procurement Contracts**

Under Saudi practice, public procurement contracts' regulations are covered by the Purchasing Law which includes general principles as guidelines for contracting authorities to follow when signing a procurement contract, whatever its type, whether public works, supply or service. Under UK practice, on the other hand, each type of procurement contract has its own regulations, such as public works contract regulations, until the new EC procurement regulations which came into force in January 2006 and combined the three procurement regulations into one set.

A brief analysis of these contracts is presented below.

#### **A. Public Works Contracts**

A Public Works Contract is one of the most important contracts in Saudi Purchasing Law. The country's rapid development has necessitated huge public works contracts in order to build the required infrastructure. The government instituted the Department of Public Works in 1963 to design and control public works' execution in the country. The Department became a ministry in 1975. During modernisation of the country, public works' contracts have accounted for the lion's share of public contracts in the country. Billions of Saudi Riyals have

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<sup>66</sup> S. Arrowsmith, *supra* n. 27, p. 172.



been spent on developing the country since the early 1970s. Most public works contracts are executed by foreign contractors.

Neither the Purchasing Law nor its Implementing Regulations defines 'public works'. However, government practice suggests that it includes all works connected with land, such as the construction of buildings, roads, and bridges, and civil engineering work.

Unlike Saudi procurement regulations, the UK procurement system has enacted particular regulations for public contracts.<sup>67</sup> Public Works Regulations cover:

(a) Contracts for carrying out a work or works; and

(b) Contracts under which a contracting authority engages a person to procure by any means.<sup>68</sup>

Pursuant to article 2, 'works' means any of the activities specified in schedule 1 to the regulations, which covers, for example, general building and civil engineering work and demolition work, construction of roads, bridges, railways, installation (fitting and fixtures), such as gas fitting and plumbing, etc. In addition, 'work' defines 'the outcome of any work that is sufficient of itself to fulfil an economic and technical function.

Public works contracts regulations do not, however, cover all works associated with general building such as building maintenance, which is regarded as a services activity according to the High Court of Justice in *General Building*

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<sup>67</sup> Works Regulations, Art. 2 (1) and Supply Regulations, Art. 2 (1).

<sup>68</sup> *Ibid*, Art. 2 (1).

*and Maintenance v. Greenwich Borough Council*.<sup>69</sup> In contrast, Saudi practice places maintenance activities under the umbrella of services contracts.

## **B. Public Supply Contracts**

The public authority usually uses supply contracts to provide a variety of goods. Neither Saudi Purchasing Law, nor the UK Supply Regulations define the meaning of 'goods'. They can range from goods consumed on a daily basis by the public authority, such as office equipment and spare parts, to high technology goods, such as ships, aircraft and vehicles.

Public supply contracts are defined in article 2 (1) of the UK Public Supply Contract Regulations (Supply Regulations hereinafter) as relating to the purchase of goods and the hire of goods.<sup>70</sup> In contrast, the hire of goods is not regulated by the Purchasing Law. As a result, it is not considered a type of supply service under the Purchasing Law.

In some cases, suppliers have dual obligations when they supply goods. They are required to supply goods and provide "any fitting or installation of those goods".<sup>71</sup> Installation work is generally covered by the works or services regulations, but this provision appears to bring within the supply regulations installation contracts which also include the supply of the product installed.<sup>72</sup> As a consequence, definition of the contract type depends upon its value or

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<sup>69</sup> *General Building and Maintenance v. Greenwich Borough Council*, [1993] I.R.I.R. 535.

<sup>70</sup> Supply Regulations, *supra* n. 59, Art. 2(1).

<sup>71</sup> *Ibid*, Art. 2(1)(b).

<sup>72</sup> S. Arrowsmith, *supra* n. 27, p. 130.

installation. If the value of goods to be supplied exceeds that of services or work to be performed, the contract is deemed a supply contract. If, on the other hand, the value of services or works included in the contract exceeds that of goods, the contract is deemed a works or services contract.<sup>73</sup> Saudi Purchasing Law, in contrast, does not distinguish between the supply of goods and their installation, whatever the value of the installation. It deems all such contracts as supply contracts, even if the value of the installation exceeds the value of the goods.

In general, under the Purchasing Law, the public authority signs a supply contract for suppliers to supply its needs. In some cases, the contracting authority may take the role of supplier and order its agents to supply its products to the market,<sup>74</sup> for example, when an Agriculture Ministry sells its farm products to the society.

### **C. Public Services Contracts**

Neither Saudi Purchasing Law nor UK Public Services Contracts Regulations (Public Services hereafter) expressly define the word "services". Instead, Article 2 (1) of the Public Services Contracts Regulations defines a 'public services contract' as a contract under which a contracting authority engages a person to provide services.<sup>75</sup> The Saudi Council of Ministers

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<sup>73</sup> P. Trepte, *Public Procurement in the EC*, (Oxfordshire, CCH Editions Limited, 1993), p. 98.

<sup>74</sup> A. Al – Wehaiby, "The Organizing Principles for Administrative Contracts and its Applications in Saudi Arabia", (1<sup>st</sup> Edition, Riyadh, 2002), p. 39.

<sup>75</sup> Services Regulations, *supra* n. 65, Art. 2 (1).

introduced a new standard form for maintenance contracts, 'the Maintenance Contract hereinafter', in order to regulate services activities.<sup>76</sup> It is almost identical to the Saudi Public Works Contract Standard.<sup>77</sup> However, the Maintenance Contract does not specify any particular purchases as services, although one may infer from the Purchasing Law regulations that the nature of some activities suggests viewing them as services. For example, maintenance and repair of office equipment, vehicles, buildings, roads and building cleaning are covered by the Maintenance Contract. Research studies, consultants, accounting and advertising services are also regulated by the Maintenance Contract.

In contrast, UK public services regulations list categories of services activities in Schedule 1, Parts A and B. Part A covers maintenance and repair of vehicles and equipment, transport by land, telecommunication services, financial services, such as banking and insurance, market research, accounting and architectural services,<sup>78</sup> while part B covers hotel and restaurant services, legal, security, education, and investigating services.<sup>79</sup>

UK public services regulations exclude some contracts, for example, employment, public works, supply, and utility contracts are excluded from the services regulations.<sup>80</sup> The criteria that distinguish services in these contracts and the public services regulations are expressly stated. Some services are specified

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<sup>76</sup> Maintenance Contract, Council of Ministers Decision no. 268 dated 30/10/1422 AH (2001).

<sup>77</sup> Public Works Contract Standard, Council of Ministers Decision no. 136 dated 13/6/1408 AH (1988), Art. 55.

<sup>78</sup> Services Regulations, *supra* n. 65, Schedule 1, Part A.

<sup>79</sup> *Ibid*, Schedule 1, Part B.

<sup>80</sup> *Ibid*, Art. 2 (1) (a,b,c,d).

in part A and part B schedules in the public service regulations.<sup>81</sup> Maintenance and repair vehicles, financial services, computer and related services, advertising services, insurance and banking, investment services, hotel and restaurant services, and legal services are examples of services covered by public services regulations. An indication of services covered by the services regulations helps to prevent overlap between the various procurement regulations.

#### **IV. A comparative analysis**

A comparative analysis between the two procurement systems shows that the two procurement systems distinguish between public and private contracts. While the Saudi system adopts two types of contract: public and private, procurement contracts under the UK system are private with features of the public contract. Such features appear in allowing the contracting authority to alter specifications after signing the contract and terminating the contract in the public interest before the deadline agreed for completion of the contract. In addition, general conditions of UK procurement contracts regulated by the Contract Law which require the parties to the contract to take their disputes to the ordinary court, or Session Court under Scottish regulations, as mentioned in chapter nine, if the authority breaches its contractual obligations. The case is different under Saudi public contract. The parties to the contract are required to take their disputes before the administrative court, the Board of Grievances, not

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<sup>81</sup> *Ibid*, Art. 2 (1)(2).

before the ordinary court, Sharia'h Court. Second, the contracting authority as a contractual and political entity has wide power to take many decisions unitarily while supervising the contract without consulting the private contractor. It has the power to suspend the contract if the other party has breached its contractual obligations, to penalise the other party for any contractual breach, to terminate the contract in the public interest and to compel the contractor not to suspend his performance if the authority breached its obligations before obtaining a permission to suspend from the court.

This chapter has explored the characteristics of public contracts. Neither the Purchasing Law nor UK procurement contract regulations present formal criteria to distinguish between public and private contracts. In practice, they are alike as regards the creation of a contract which will be recognised by the court, such as agreement (offer and acceptance), consideration, and contractual intention. However, the Saudi Board of Grievances emphasises three criteria for distinguishing a public contract: the public authority contracts to provide a public need; the contract contains provisions unusual in private contracts, and the public authority, as one of the parties, deals with the other party as both a contractor and a political entity. Although public procurement contracts have similar criteria under UK procurement contract regulations, the principles of private law govern UK public contracts.

## **Summary**

This chapter is important to this study since it provides an introduction to the characteristics of public procurement contracts.

It has explored the characteristics of public contracts. In fact, there are no formal criteria to distinguishing between public and private contracts. They are alike in their basic essential which will be recognised by the court, such as agreement (offer and acceptance), consideration, and contractual intention. However, public contracts may be distinguished from private contracts in respect of three criteria: the public authority contracts to provide a public need; the contract contains provisions unusual in private contracts, such as a provision for modifying the rules of the contract or extending the agreed date of its execution; and the public authority, as one of the parties, deals with the other party as both a contractor and a political entity. The latter characteristic allows the government to exercise its sovereignty to control the contract's execution. It thus possesses exclusive authority to grant or deny a private party the right to provide public services. This chapter has shown that Saudi and UK contracting authorities' practice differs in terms of unusual conditions in procurement contracts. UK public agencies, in one hand, have power to alter the contract's specifications and to terminate it before its due time in the public interest while Saudi public agencies enjoy wider powers of control over the procurement contract.

Further, there are many ways to define public procurement contracts; by legislation when decision-makers categorise particular contracts as a public

### **CHAPTER THREE**

contract, such as public supply contracts, and when a court classified a particular contract as a public contract.

This chapter provides a useful introduction to the next chapter, which will discuss some of the main principles of public procurement contracts, such as equal treatment and transparency principles.



## Chapter Four

### Principles of Public Procurement Contracts

## **Chapter Four: Principles of Public Procurement Contracts**

### **Preamble**

Equal treatment is a constitutional principle in most countries. Consequently, it is a constitutional task in most countries to apply the law without bias. In this context, the law must not include provision favouring or prevention of a particular body from participating in the procurement market. Therefore, procurement officials who usually apply procurement regulations are under a responsibility to treat all contractors, who are in the same position, equally. They are required to enforce the regulations without discrimination in favour of or against a particular contractor.

Various countries nevertheless differ in applying equal treatment principle just mentioned. While most countries insist on formal equality being upheld, which prevents their official employees from conducting any form of discrimination during the implementation of procurement regulations, other countries, notably the United States and most developing countries, including Saudi Arabia, implement measures and regulations which provide less favourable treatment to foreign products and contractors, thus encouraging preferential treatment to national products and contractors.

This chapter will be divided into two parts. The first part will explore the principle of equal treatment under Saudi and UK procurement contract regulations, and examine why countries adopt discriminatory policies and favour

their own national products and contractors. The second part will investigate the principle of transparency under the two systems.

## **I. Equal treatment**

### **Preamble**

The principle of equality is one of the most important principles of procurement regulations. It is a basic principle, even if it is not expressed explicitly in the contract. Consequently, this principle can be held to be directly applicable to contracts made by a public authority. All interested contractors have a right to be treated equally. The equality principle requires the public authority to justify its procurement policies and prohibits it from engaging in arbitrary conduct. It must not discriminate between contractors on arbitrary grounds. The principle of equality indicates that the provision of public services is not simply a commercial arrangement between the authority and specific contractors, but is a common enterprise in which all interested contractors are able to participate. When the public authority enters into a public or government contract, it deals with the other contractor as both a contractor and a political entity. The equality principle prevents it from imposing differential treatment without objective and reasonable justification.

But how should the principle of equal treatment be applied? Does it mean providing equal treatment to all contractors irrespective of their experience, specialism and size, or should differentiation between contractors be recognised?

Procurement regulations do not usually apply the notion of equality to all tenderers or contractors, differences between them in terms of experience and specialism are taken into account. Such regulations usually enact conditions to distinguish among contractors, since most contractors are experts in particular types of procurement. Some are specialists in supplying goods, some in public works, others in services, and so on. When a public authority invites tenders for public works, for example, it may be justified in preventing contractors who are not experts in public works from entering such competition.<sup>1</sup> In this case, the equality principle is exercised in respect of those who have similar experience in public works, and who should be treated equally.

It is intended to first examine the principle of equality in Saudi Procurement Regulations and then in UK Procurement Regulations. The second part will explore preferential policies under the two procurement systems.

### **A. The equality principle in Saudi Procurement Regulations**

In general, equality between people in the country is a constitutional principle emphasised by the Basic Law of the Government.<sup>2</sup> It binds the government to accord citizens some similar treatment. They must be treated equally in terms of education, jobs, health treatment, and when using public facilities. One aspect of fair treatment is to put all interested contractors on an equal footing. This basic rule is to be observed when a procuring government

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<sup>1</sup> Saudi Finance Ministry letter no. 17/3403 dated 11/2/1400 AH (1980), letter no. 18630 dated 25/11/1399 AH (1977), and letter no. 17/13551 dated 8/9/1397 AH (1976).

<sup>2</sup> Basic Law of the Government, Royal Decree no: A/90 March 1, 1992, Art. 12.

entity purchases and executes its projects and works. All persons and establishments who wish to deal with the government "shall ...have equality of opportunity and be treated equally".<sup>3</sup>

In particular, equal treatment is deemed a general principle under the Purchasing Law, although in fact, only one article makes reference to contractors having equal opportunity and being treated equally. Article 1(a) states that all persons and establishments who wish to deal with the government shall ... have equal opportunity and be treated equally.<sup>4</sup> This general principle precludes public agencies not only from practising in a discriminatory manner, but also from taking any steps which might lead to a similar consequence.

Unfortunately, neither the Purchasing Law, nor its Implementing Regulations include any specific requirement to which the contracting authority must adhere in order to comply with the obligation of equal treatment. However, one may infer from the general meaning of some provisions of the Purchasing Law and the practice of the contracting authority, implied notions addressed some equality requirements. In general, the Purchasing Law requires public agencies to provide procurement information about the required work to the all interested competitors,<sup>5</sup> to hold a procurement competition open to all interested contractors,<sup>6</sup> to evaluate tenderers on the basis of objective criteria,<sup>7</sup> and to treat procurement disputes fairly.

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<sup>3</sup> Purchasing Law, Royal Decree no: M / 14 dated 7 / 4 / 1397 AH (1977), Art. 1.

<sup>4</sup> *Ibid*, Art. 1(a).

<sup>5</sup> *Ibid*, Art. 1(b).

<sup>6</sup> *Ibid*, Art. 2.

Each one of these requirements will be analysed separately below.

**1- Equality of information**

Equality of information is an important requirement because it serves both equality of treatment and transparency principles. The latter principle will be discussed in detail in the second part of this chapter.

Equality of information requires the contracting authority to ensure that all competitors are provided with full information about the competition on an equal basis. Article 1(b) of the Purchasing Law states that 'full and consolidated information about the required work shall be made available at the same time to competitors'.<sup>8</sup>

One can infer that this requirement addresses the contracting authority's obligation to treat all tenderers equally. In other words, the equality of information requirement protects tenderers' rights when preparing their tenders to participate in the procurement competition.

Accordingly, the contracting authority is under an obligation to provide in advance an equal amount of information to all tenderers about the competition. In order for tenders to be submitted as required by the Purchasing Law, the contracting authority is responsible for furnishing tenderers with any information required. In practice, the contracting authority is obliged to publish its intention to procure in the Official Gazette, *Um al-Qura*. This publication is in the Arabic language, which may present difficulties to foreign competitors who intend to

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<sup>7</sup> *Ibid*, Art. 9.

<sup>8</sup> *Ibid*, Art. 1(b).

compete in the Saudi market, since they will have to translate the procurement information into their own language before submitting their bids. It is therefore submitted that procurement documents should be issued in different languages in addition to Arabic to ensure the language restriction does not preclude foreign contractors from participating in the Saudi procurement market. In fact, some procurement regulations request the contracting authority to issue procurement documents in two languages; the language of the country and a foreign language. Article XII.1 of the GPA, for example, states that if a procuring body allows tenders in several languages, one of them must be an official language of the World Trade Organisation (WTO), English, French, or Spanish.<sup>9</sup>

Moreover, the equality of information principle ensures that all interested tenderers are treated on an equal footing in relation to specifications and designs designated by the contracting authority. In this context, the contracting authority is required to evaluate tenders according to the requirements of the specification for which it has requested tenderers to submit their prices. Therefore, it is a breach of the principle of equality if the contracting authority accepts the offer of one tenderer because his price is based on a specification which differs from that originally specified by the contracting authority. Accordingly, the Board held that the decision of the contracting authority in this regard discriminated in favour of

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<sup>9</sup> GPA, Uruguay Round Annex 4: Multilateral Trade Agreements, April 15, 1994 Government Procurement Agreement (GPA), GATT, available on <http://www.wto.org> and LEXIS, GATT file, Art. XII.1.

a particular tenderer which breached the equality of treatment of the Purchasing Law.<sup>10</sup>

## **2- Open procurement competition**

Equal treatment includes an implied goal to encourage all interested people to participate in the government's business. This implied goal is met when public procurement projects are publicised in the *Official Gazette* to encourage every interested person in the country to benefit from the government's business. It is worth noting that price levels are generally higher in direct purchasing and restricted tendering procedures, which do not have free competition, than in open tendering procedures which allow all tenderers to submit their tenders.<sup>11</sup>

Most procurement regulations, including the Purchasing Law, support the use of the open tendering procedure, as the main procedure for evaluating and selecting a successful tenderer. This procedure gives all interested contractors the opportunity to tender, increases competition between interested contractors, and assists the contracting authority in achieving a better price. The Purchasing Law requires the contracting authority to advertise procurement opportunities in the *Official Gazette*<sup>12</sup> and other local newspapers.<sup>13</sup>

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<sup>10</sup> *Case no. 2710/1/K dated 1419 AH (1999)*. It should be pointed out that the ECJ held in Case C-243/89, *Commission v. Denmark* [1993] ECR I – 3353 (*the Storebaelt case*), which had similar circumstances to the Board's case, that the requirement of equal treatment would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservation, except where those terms expressly allowed them to do so. Accordingly, all tenderers must submit conforming tenders in order to enable objective comparison.

<sup>11</sup> Government Contracts Open up New Prospects for Saudi Construction Sector, Report issued by Saudi Commercial National Bank, Issue No. 1, Vlo. 13, 2003, p. 6.

<sup>12</sup> Purchasing Law, *supra* n. 3, Art.21(a).



However, there is ambiguity in the provisions of the Purchasing Law regarding the open tendering procedure, since it does not clarify when the contracting authority is required to use the open or another tendering procedure, yet insists that the open procedure must be the main tendering process procedure,<sup>14</sup> and all contracting authorities should use this procedure as much as they can.

In practice, among other reasons, in order to select specialist contractors, or to ensure quick performance of the required work, some public agencies do not use the open procedure. They sometime use the restricted tendering procedure to select particular contractors to procure. The consequence of this practice is the prevention of some tenderers from participating in the opportunity to procure. In this regard, some public agencies in Saudi Arabia have contacted particular contractors to procure and not invited others. Some contractors have complained<sup>15</sup> to the Cabinet Office, "*Al-Dewan Al-Malaki*" on account of this practice. The Cabinet Office subsequently issued its Royal Circular to all public agencies, which stipulates that "All interested contractors must be given full and fair opportunity to participate in procurement contracts. The contracting authority is required to publicise its projects in an open procedure and give contractors enough time to submit their tenders".<sup>16</sup> Unfortunately, this royal circular repeats the provisions of the Purchasing Law and provides no direct

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<sup>13</sup> A. Al - Wehaiby, " *The Organising Principles for Administrative Contracts and its Applications in Saudi Arabia*" (1<sup>st</sup> Edition, Riyadh, 2002), p.97.

<sup>14</sup> Circular no. 3/ W / 23401 dated 18 / 10 /1401 AH (1981).

<sup>15</sup> Circular no. 3/ H / 2601 dated 10 / 2 /1401 AH (1981).

<sup>16</sup> Royal Circular no. 9751 dated 26 / 4 / 1403 AH (1983).

guidance to public agencies on where to use the open tendering procedure. In fact, public agencies continue to engage in tendering processes which support favouritism because there is no framework to guide their selection of tendering procedures. It is submitted that law-makers should issue clear guidelines to instruct public agencies when they must use the open tendering process and provide particular criteria to guide them on how to apply the equal treatment principle when using this tendering procedure.

There are other factors which preclude free procurement competition under the Purchasing Law. One may summarise these barriers as below:

As previously mentioned, the characteristics of some procurement projects force the contracting authority to invite only a limited number of contractors to procure. Most procurement regulations recognise procurement projects have different characteristics and allow the contracting authority to use a limited or selective tendering process to contract with a particular contractor.<sup>17</sup>

In addition, the contractor's ability to procure is dependent on him being able to meet certain requirements. The Purchasing Law requires all interested contractors to "satisfy the conditions qualifying them for such dealing".<sup>18</sup> One of the prequalification requirements stipulated is that of registration. Each contractor must register his company or establishment in the Company Department of the Ministry of Commerce. Such registration means the person or

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<sup>17</sup> Purchasing Law, *supra* n.3, Art 2(b), UNCITRAL Model Law, Arts. 20, 21, and 22. and GPA Art. VII(3).

<sup>18</sup> Purchasing Law, *supra* n.3, Art. 1/a.

firm in question is licensed to carry out the work in which they specialise.<sup>19</sup> Foreign companies which are invited to submit tenders are required to produce a certificate from the Ministry of Commerce indicating they are authorised to perform the work required. Moreover, Article 29 of the Chamber of Commerce Act states that "a trader, contractor, or broker shall not be accepted to participate in government or municipal tenders and auctions unless he is affiliated to the Chamber of Commerce".<sup>20</sup>

There are other exceptional cases excluded from the principle of equality. The Council of Ministers has enacted rules<sup>21</sup> banning various branches of the government from dealing with certain persons and firms. The government is not allowed to purchase or accept tenders from government officers, prisoners, or a person who has not attained eighteen years of age. Moreover, when a contractor has resorted to cheating, fraud, or speculation in engaging with the government, he is henceforth prohibited from dealing with government procurement. However, the Finance Ministry has established a judicial committee to look into reports of fraud, cheating, or speculation.<sup>22</sup> The contractor has the right to appeal to the Board of Grievances, and to receive compensation and continue dealing with the government if the public agency's decision is found to have been unjust or mistaken.

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<sup>19</sup> Letter, no. 17 / 3744 dated 27 / 2 / 1398 AH (1978), Ministry of Finance.

<sup>20</sup> Chamber of Commerce Act, Royal Decree no. M/6 dated 30 / 4 / 1400 AH (1980).

<sup>21</sup> The Council of Ministers' Decision no. 11 dated 6/2/1400 AH (1980).

<sup>22</sup> *Ibid*, Art. 3.

One may criticise the notion of equal treatment under Saudi, UK, GPA, and EC Directives. The aforementioned apply equality of treatment only to contractors who are registered within signatories to the GPA, within EC member states, or Saudi Arabia, and discriminate against foreign contractors. A close examination of Saudi and EC procurement regulations reveals both groups' procurement regulations discriminate against foreign contractors. Indeed, the two procurement systems apply similar regulations to favour particular groups of contractors. For instance, Saudi products and contractors are given priority in government dealings.<sup>23</sup> Saudi public agencies first invite Saudi firms to procure, if no tenders are received then the invitation is extended to firms having mixed capital (Saudi and foreign).<sup>24</sup> If the agency still fails to find a tenderer, only then will an invitation to tender be issued to foreign suppliers.<sup>25</sup> EC Procurement Directives require each member state to provide equal treatment to other member states' products and contractors. However, EC member states adopt discriminatory policies against the products and contractors of non-member states of the EU. In fact, EC Procurement Directives adopt discriminatory treatment similar to that adopted by Saudi regulations. For example, Saudi contractors cannot participate in EC procurement competition because Saudi Arabia is not a member state of the EU. Similarly, UK or Italian contractors who are EC members but not registered in Saudi Arabia experience less favourable

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<sup>23</sup> Purchasing Law, *supra* n.3, Art. 1(d).

<sup>24</sup> *Ibid*, Art. 1(d).

<sup>25</sup> *Ibid*, Art. 3(b) especially for various types of automobiles i.e. fire engines and heavy mobiles, if there is no appointed agent in the country for such equipment, the purchase may be made direct from the manufacturer.

treatment than Saudi contractors. In similar manner, although the objective of the GPA is to open up the procurement market through non-discriminatory and transparent measures, however, only signatories to the GPA enjoy anti-discriminatory treatment. Other contractors are not qualified to enter their procurement markets. In fact, only contractors in countries signatories to the GPA have the right to enjoy national non-discriminatory treatment by other signatory members.<sup>26</sup>

The notion of anti-discrimination requires countries to treat all contractors equally in spite of their nationality of origin. All contractors should be treated according to the same standards to which local contractors are required to adhere. Thus, Saudi Arabia, the UK and the EC could refuse to allow contractors, either local or foreign, to participate in their procurement market if they violated their procurement standards.<sup>27</sup>

### **3- Evaluating all tenders equally**

The equal treatment principle should be clearly observed in the evaluation stage of the tendering process. The evaluation of tenders, received as a result of the contracting authority's invitation to participate in the procurement contract, is an important procedure before selecting the successful tenderer. In this procedure, the contracting authority must make a comparison of tenders

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<sup>26</sup> The American Trade Agreement Act of 1979 precludes the US Government from purchasing any goods or allowing contractors of third countries from entering the US procurement market if they do not become a signatory to the GPA or at least provide a reciprocity treatment to US products and contractors. For details see C. Tiefer, *The GATT Agreement on Government Procurement in Theory and Practice*, Summer 1997, *University of Baltimore Law Review*, pp.31-52.

<sup>27</sup> M. Trebilcock and R. Howse, *Trade Liberalisation and Regulatory Diversity: Reconciling a Competitive Market with Competitive Politics*, *European Journal of Law and Economics*, Vol. 6, 1998, p. 7.

submitted to perform the procurement work in order to select the best tender. The theme of equality appears in treating all tenders equally. In practice, the contracting authority is under obligation to consider several criteria during the evaluation process. Price, technical suitability, financial ability, tenderers' professional history, quality and profitability are common criteria used to select the contractor. Any discrimination in the evaluation of competitive tenders is a breach of the equality principle and may exclude particular tenderers from the competition.

Equality of evaluation requires the contracting authority to evaluate all tenders in order to select the tender most advantageous to the contracting authority. This is the basic aim of the evaluation process. Accordingly, when one or more tenderers are excluded from the evaluation procedures without reasonable justification they have the right to challenge the authority's action and request such discrimination be eliminated. However, equality of evaluation was not observed when the Finance Ministry supported the Education Ministry when the latter excluded most tenderers from the evaluation process because it had decided to select the five lowest tenders for evaluation purposes.<sup>28</sup> Excluding most tenderers because the public agency had received a huge number of tenders was not fair practice, since it discriminated in favour of the five lowest tenders. The Finance Ministry's support of the Education Ministry's decision also

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<sup>28</sup> The Education Ministry had asked the Finance Ministry if it was possible to evaluate the five lowest tenders if too many tenders were received. The Finance Ministry considered such a request permissible because it did not contradict the general rules. Education Ministry letter no. 114/34/1560/51 dated 3/9/1400 AH (1980) and the Finance Ministry letter no. 17/17997 dated 11/9/1400 AH (1980).

appears to confer on the contracting authority the power to exclude any tender whose price is too high or not low enough. If such action is viewed as acceptable then there is no need to call tenderers to participate in open tendering procedures. If the public authority receives a high number of tenders it should be prepared to evaluate all of them and establish many evaluation committees in order to examine them so as not to breach the equal treatment principle.

Before concluding this section, it is worth mentioning that Saudi and UK differs in tendering procedures adopted. As mentioned in chapter six, section I (evaluation procedures under Saudi Purchasing Law), even though Saudi Purchasing Law includes two award criteria the lowest price and the most economically advantageous tender, the Evaluation Committee is empowered to apply only the lowest tender principle. In the tendering procedure, it is not usual to mention the award procedure when publicising procurement opportunities. Unlike UK regulations, Saudi public agencies are under no obligation to introduce a particular award procedure and consequently are not obligated to inform tenderers if they change the award procedure type. Further, since the Board has adopted the equality principle in procurement regulations,<sup>29</sup> as adopted by UK procurement regulations (see the next section), Saudi public agencies have no right to change information included in the tender document without informing all tenderers about such change. Consequently, tenderers have the right to challenge the action of the public agency if it accepts a tender according to a new specification and ignores tenders based on an old specification. The

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<sup>29</sup> *Case no. 216 / 1 / K dated 1418 AH (1998).*

requirement to evaluate all tenders equally necessitates the contracting authority not discriminating in favour of one tenderer and providing similar treatment to all tenderers, which means publishing similar specifications in tender documents and evaluating all tenders received according to the published specifications.

### **B. Principle of equality in UK procurement regulations**

Equal treatment is one of the important principles under the UK procurement contract regulations. It obliges contracting authorities to treat tenderers and contractors equally whether local or EC nationals. UK procurement contract regulations designed reasonable eligibility criteria and clear tendering procedures to help tenderers and contractors in EC member states to send their tenders to supply goods or services. The procurement regulations obliged the contracting authority to advertise their procurement opportunities in the EC *Official Journal* and its local press to allow for genuine competitive tendering procedure. Further, they require the contracting authority to justify some of its tendering decisions, such as rejecting an abnormally low tender,<sup>30</sup> awarding a contract to a successful tenderer. It is also required to inform an unsuccessful tenderer within 15 days of the evaluation process why he was unsuccessful.<sup>31</sup> All tenderers must be conformed to the specification and the contracting authority must not accept any tender not comply with the advertised specification.

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<sup>30</sup> The Public Works Contract Regulations 1991(Works Regulations), no. 2680, Art. 20(7) and The Public Supply Regulations (Supply Regulations), 1995, no. 201, Art. 21(7), and Public Services Contract Regulations (Services Regulations), 1993, no. 3228, Art. 21(7).

<sup>31</sup> *Ibid*, Arts. 22(1) and 23(1).



Generally, UK procurement regulations require the contracting authority to publish procurement projects in order to satisfy many factors, including: to open the procurement competition to all interested contractors, and to evaluate tenderers on the basis of objective criteria.

Each one of these aspects is analysed separately.

### **1- Equality of information**

In addition to the transparency principle, this criterion exists to provide equal treatment to all interested contractors.

Tenderers have the right to receive sufficient information about the required work. To ensure they are treated on an equal basis, the regulations stress the responsibility to make procurement information available to all tenderers, so that they submit the relevant information.<sup>32</sup> In consequence, this will help the contracting authority conduct a genuine competition between the concerned contractors. In fact, the regulations oblige the contracting authority to state the criteria on which it intends to base the award procedure.<sup>33</sup> Accordingly, it should decide initially whether it will evaluate tenders on the basis of the lowest price or on the basis of the most economically advantageous offer.<sup>34</sup> This factor highlights an important distinction between Saudi Purchasing Law and UK procurement regulations. Even though the Purchasing Law requires the contracting authority to provide equal information to all tenderers, it does not

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<sup>32</sup> A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing*, (London, Kluwer Law International, 1999), p. 83.

<sup>33</sup> Works Regulations), Art. 20(1), Supply Regulations Art. 21(1) and Services Regulations, Art. 21(1).

<sup>34</sup> *Ibid*, Art. 20(3), and Art. 20(3).

require the authority to make clear, from the first step of the tendering process, the basis of the award procedure. In practice, tenderers in the Saudi procurement market usually enter the procurement competition with insufficient information about the basis of the award.<sup>35</sup> In fact, they will only know the basis of the award when they attend the meeting to which the contracting authority has gathered them in order to announce the name of the successful contractor.

UK tendering regulations are similar to those of Saudi Purchasing Law in that the contracting authority is required to publish a notice of each procurement project in the *Official Journal* <sup>36</sup> in order to disseminate the procurement information to an unlimited number of EC contractors.

EC Directives, the GPA,<sup>37</sup> and the UNCITRAL Model Law<sup>38</sup> contain identical provisions requiring procuring entities to publish information about procurement projects. Under EC Directives, the availability of procurement information gives 'potential suppliers and contractors from other Member States the opportunity to know about and compete for contracts in which they are interested'.<sup>39</sup>

The objective of providing equal information to all interested contractors and suppliers, as mentioned above, is to ensure there is genuine competition. In order for this to be achieved, the notice or the invitation to tender should include

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<sup>35</sup> Riyadh Chamber of Commerce, *Saudi Construction Sector: Challenges and Ambitions*, a work paper presented by the Riyadh Chamber of Commerce, General Annual Meeting for Saudi Contractors, Riyadh, 10/2/2001.

<sup>36</sup> Works Regulations, Art. 9, Supply Regulations, Art. 9, and Services Regulations, Art. 9.

<sup>37</sup> GPA, *supra* n. 4, Art. V.(3).

<sup>38</sup> The UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted by the United Nations Commission on International Trade Law (UNCITRAL) at its twenty-seventh session, *Official Record of the General Assembly, Forty-ninth session, Supplement No. 17(A/49/17)*, United Nations, New York, 1994.

<sup>39</sup> 'Communication on a Community regime for procurement in the excluded sectors' (presented by the Commission to the Council on 11 October 1998). Cited in A. Reich, *supra* n. 32, p. 270.

sufficient information about the project's requirements of the tendering process. For example, it should include some information about technical and financial qualifications which the project requires. In this regard, the contracting authority must not use such information to preclude contractors from participation. In order to ensure local contractors only participate in procurement projects, some countries design procurement specifications to meet local standards. UK procurement regulations require that technical specifications be defined by reference to "any European specifications which are relevant".<sup>40</sup> Accordingly, a UK contracting authority is under obligation to use European specifications in order to eliminate discrimination based on the description of national standards.<sup>41</sup> However, contracting authorities in Member States can refer to national standards in some circumstances. For example, a UK contracting authority may refer to British technical specifications if the European specification is incompatible with equipment already in use.<sup>42</sup> Further exceptions apply where it is technically impossible to establish conformity in a satisfactory manner.<sup>43</sup>

When a contracting authority decides to use one of these exceptions, it is under an obligation to "state in the contract notice or in the contract document the reason for doing so".<sup>44</sup> It is prohibited for a procurement contract to refer to

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<sup>40</sup> Works Regulations, Art. 8 (3), Supply Regulations, Art. 8 (3), and Services Regulations, Art. 8 (3).

<sup>41</sup> C. Bovis, "An Impact Assessment of the European Public Procurement Law and Policy", (1999) *Journal of Business Law*, p. 127.

<sup>42</sup> Works Regulations, Art. 8 (4) (c), Supply Regulations, Art. 8(4)(c), and Services Regulations, Art. 8(4)(c).

<sup>43</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement*, (London Sweet & Maxwell, 1996), p.591.

<sup>44</sup> Works Regulations, Art. 8 (6), Supply Regulations, Art. 8 (6), and Services Regulations, Art. 8 (6).

a particular trademark, patent, type, or specific origin,<sup>45</sup> unless such a reference is justified by the subject of the contract.<sup>46</sup> As a result, without such justification, Member States are prohibited from introducing into contractual clauses relating to a given contract, technical specifications which mention products of a specific make or source, or a particular process, and which therefore favour or eliminate certain undertakings.<sup>47</sup>

## **2- Open procurement competition**

Open competition will help the market to preclude monopoly and assist it to operate more efficiently. The price level is usually higher in a monopolist market than in the open market. Thus, the price level of limited and single tenders is higher than that of open tenders because the competitive process helps to reduce such level. Open procurement competition also gives the contracting authority better choice of price and quality of work.

Conducting procurement competition on a fair and open basis is a fundamental principle in most procurement regulations. EC Directives and UK regulations are designed to ensure bids are evaluated in a fair manner and tenderers are given full and fair opportunity to compete.

While procurement competition under Saudi Purchasing Law is restricted to those contractors who have registered their firms in Saudi Arabia,

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<sup>45</sup> Works Regulations, Art. 8 (9), Supply Regulations, Art 8 (9), and Services Regulations, Art. 8 (9).

<sup>46</sup> Works Regulations, Art. 8(10)(a), Supply Regulations, Art 8(10)(a), Services Regulations, Art. 8 (10)(a).

<sup>47</sup> *Case 45/87, Commission v. Ireland (Dundalk case), (1988), E.C.R. 4929.*

procurement competition in the UK market is open not only to EC contractors, but also to countries belonging to the GPA.

In order to carry out the work, all EC companies that intend to operate in the UK must be registered in the appropriate department indicated in Article 14(4) of the regulations.<sup>48</sup> Refusal by a Member State to register a branch of a company having its registered office in another EC state and formed in accordance with its law constitutes an obstacle to the right of freedom of establishment conferred by Articles 43 and 48 of the EC Treaty.<sup>49</sup>

Further, contractors are obliged to show their financial and technical capacity. The contracting authority has the right to verify that the contractor meets any minimum standard of financial standing or technical capacity requested by the bid documentation. A contracting authority may request the contractor to provide a financial statement, a statement of the overall turnover of his business, and a list of works carried out over the past five years.<sup>50</sup> A contractor may be prevented from participating in procurement if he does not fulfil such requirements.

These basic requirements are common in procurement contracts and almost identical under Saudi and UK procurement regulations. However, the UK has two requirements unknown under Saudi Purchasing Law. These are the requirement of non-discrimination on the grounds of nationality and the requirement of non-discrimination on the grounds of establishment.

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<sup>48</sup> Works Regulations, Supply Regulations, and Services Regulations , Art. 14(4).

<sup>49</sup> *Case C-212/97, Centros LTD. v. Erhnervs-OG Selkabsstyrelesem*, [2000] 2 W.L.R. at 1048.

<sup>50</sup> Works, Supply, and Services Regulations, Arts. 15 and 16.

Article 13(8) of the Works, Supply, and Services Regulations obliges the contracting authority to provide equal treatment to all contractors, regardless of their nationality or place of establishment.<sup>51</sup>

The EC Treaty contains many provisions that prohibit any type of discrimination, direct or indirect, against any EC contractor. Article 12 of the Treaty prohibits "within the scope of application of the Treaty any discrimination on grounds of nationality".<sup>52</sup> It also prohibits any restriction on access to government contracts. Non-discrimination provisions are found in a number of other places: Article 28, 43 and 54 emphasise the free movement of goods, freedom of establishment, and freedom to provide services, respectively. The prohibitions in these Articles refer only to the public authority's decisions to preclude certain contractors or products, not to decisions taken by natural persons or associations which do not come under public law.<sup>53</sup> These articles provide for the abolition of nationality requirements and restrictions and administrative practices which prevent EC contractors from being treated the same way in the territories of all Member States. EC nations should become more open to each other by extending equal treatment and opening their national markets to all EC contractors. The prohibition against discrimination is one of the fundamental principles of Community law. This principle requires that

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<sup>51</sup> *Ibid*, Art. 13 (8).

<sup>52</sup> EC Treaty, Art. 6.

<sup>53</sup> *Case C-36/74, Walrave and Koch v. Association Union Cyclist International*, [1974] ECR, 1418, para15.

similar situations shall not be treated differently unless differentiation is objectively justified.<sup>54</sup>

To facilitate implementation of this principle, the Treaty imposes certain requirements. It requires EC tenderers to be aware of the rules of the procurement competition in advance and an equal amount of information should be provided to all tenderers at the same time. In addition, an offer to procure must conform with the tender specification in order to guarantee an objective comparison between tenders.<sup>55</sup>

The objective of Article 49 is to prohibit discrimination on the grounds of nationality of the person providing services. Consequently, the abolition of discrimination based on nationality creates an individual right, which national courts must protect.<sup>56</sup>

Moreover, Article 43 of the Treaty abolishes restrictions on the freedom of establishment. EC contractors have the right to set up businesses in other Member States and to register their businesses according to the law of such States. Precluding any EC contractor from registering his business in any other State constitutes an obstacle to the right of freedom of establishment conferred by Articles 52 and 58 of the EC Treaty.<sup>57</sup>

In addition to the national obligation mentioned above, the second type of obligation is the international obligation: the UK, as a signatory to the GPA, is

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<sup>54</sup> *Case C-395/89, Safa Srl v. Amministrazione Delle Finanze Dello Stato*, [1991] ECR, I-1677, para 23 at 1699.

<sup>55</sup> P. Brown, "A Matter of Principles - the Treatment of Contractors Falling outside the Scope of the European Public Procurement Directives", (2000) 9 *Public Procurement Law Review*, p.42.

<sup>56</sup> *Case C-36/74, supra* n. 65, paras. 31 -34 at 1420-21.

<sup>57</sup> *Case C-212/97, Centos LTD. v. Erhvervs - OG Selskabsstyrelsen*, *supra* n. 9, at 1048.

required to treat contractors and the products of GPA members equally. The UK is obliged to apply the most favoured nation treatment (MFN) principle and national treatment (NT) principle to GPA contractors. Consequently, it must grant to GPA members any better terms subsequently offered to other contractors. However, this obligation is not without limitation. Under the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS), government procurement is largely excluded from both national treatment and most favoured nation obligations. However, for procurement covered by the GPA, general national treatment and most favoured nation treatment do apply.<sup>58</sup>

Indeed, in addition to the NT and MFN principles, many provisions which regulate tendering procedures oblige the parties to the Agreement not to discriminate in favour of or against other signatories. Article VII states that Parties must ensure their tendering procedures are applied in a non-discriminatory manner. Further, Article X:1 obliges the contracting entities in selective tendering procedures to select firms in a fair and non-discriminatory manner. Once suppliers have been chosen from qualification lists, Article X:2 stipulates that 'any selection shall allow for equitable opportunities for suppliers on the lists'. Also, Article XIII:3 on the opening of tenders, requires that: 'the receipt and opening of tenders shall ... be consistent with the national treatment and non-discrimination provisions of the Agreement'. Moreover, Article XIV

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<sup>58</sup> S. Arrowsmith, *'Government Procurement in the WTO'*, (London, Kluwer Law International, 2003), p. 154.



stipulates that 'entities shall not, in the course of negotiations, discriminate between different suppliers'.

According to Article III of the GPA, parties are obliged immediately and unconditionally to provide to products, services and suppliers of other parties treatment no less favourable than:

- a. that accorded to domestic products, services and suppliers, and
- b. that accorded to domestic products, services and suppliers of any other party.<sup>59</sup>

These obligations will be discuss bellow.

**a. National Treatment**

The principle of national treatment is to be found in paragraph a(1) of Article III. It covers products and services.<sup>60</sup> Under this provision, parties are required to give to the products and services of GPA members the same treatment given to domestic products and services. In addition, the principle of national treatment obliges the parties to the Agreement to accord to suppliers and service providers the same rights provided to domestic providers. Accordingly, the signatories are not allowed to exclude foreign firms from participating in their procurement market, nor to give their local service providers preferential treatment, such as inviting them only to tender. The relevant contracting authority may not select the award-winning company on the basis of

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<sup>59</sup> GPA, *supra* n. 4, Art. III(1).

<sup>60</sup> The GATS Agreement does not apply to procurement provided by government agencies of services purchased for governmental purposes.



origin of relevant products or services, or the bidder's nationality; instead, its selection must be based on objective technical and economic criteria.<sup>61</sup>

It is worth mentioning that the GPA does not expressly define domestic supplier or service provider.

One can infer from the provision above (Article III (2)) that it prohibits discrimination against foreign suppliers, between domestic firm themselves, and against a domestic firms on the basis of the country of production of the goods and services. First, the rule prohibiting discrimination against foreign suppliers applies only when the foreign supplier is offering goods or services originating from a signatory member.<sup>62</sup> Conversely, it may be inferred that procuring entities may accept tenders from a domestic firm offering products from non-GPA countries. Second, Article III (2) also prohibits discrimination against local suppliers on the basis of establishment or ownership. It states that '...entities shall not treat locally-established suppliers less favourably than other locally-established suppliers on the basis of degree of foreign affiliation or ownership'.<sup>63</sup> This stipulation raises the question of how multinational firms which ownership registered in a non-GPA country but identity as a local firm in a GPA member country should be treated? The rapid development of international commerce helps such firms spread to through different parts of the world. The GPA takes into account the aforementioned issue and prohibits its signatories from

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<sup>61</sup> A. Mattera, 'The Beginning of a Long and Winding Road', *EU Public Contract Law*, March 1994, p. 5.

<sup>62</sup> B. Hoekman, & C. Braga, Protection and trade in Services, Policy Research Working Paper 1747, The World Bank, April 1997, p. 25.

<sup>63</sup> GPA, Art. III (b)(a).

discriminating against local firms in signatory countries even if their shareholders are foreign nationals. Third, according to Article III (2) a signatory member is also prohibited from discrimination against a domestic firm 'on the basis of the country of production of the goods or service being supplied, provided that the country of production is a party to the Agreement'.<sup>64</sup>

**b. Treatment no Less Favourable**

The fundamental objective of the GPA is to liberalise the procurement market through equality of treatment. This article aims to ensure that any procurement decision is applied in non-discriminatory manner.<sup>65</sup> Thus, if one signatory member agreed to provide preferential treatment to one country, this treatment should immediately be extended to all other signatory members on a MFN basis. Consequently, all signatory members have the right to benefit to the same extent as the most favoured nation.

This principle applies to all laws, regulations, procedures and practices covered by the GPA code.<sup>66</sup> Although the text of Article III(1) specifies any law, regulation, procedure or practice covered by the GPA code, it should be noted that the agreement also covers any laws or regulations which might adversely modify the conditions of competition between domestic and imported products "or suppliers" in the internal market.<sup>67</sup>

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<sup>64</sup> Ibid, Art. III (b)(b).

<sup>65</sup> H. Espiell, The Most-Favoured-Nation Clause: Its Present Significance in GATT, *Journal of World Trade Law*, p36.

<sup>66</sup> Ibid, Art. I(1).

<sup>67</sup> *Panel Report on the United States Section 337 of the Traffic Act of 1930*, (Report of the GPA Panel), Paragraphs 5.11 and 5.13, adopted on 7 November 1989, (L/6439-365/345), p.41.

The GPA does not have a standard to determine "treatment no less favourable", therefore this phrase has been the subject of debate in many panels and Appellate Body reports. The United States stated that "the parties to the GPA would create a standard to determine less favourable competitive opportunities".<sup>68</sup> Notwithstanding, no standard has yet been established to clarify this.<sup>69</sup> In the absence of such a standard, methods of determining "treatment no less favourable" will differ from one party to another. Korea, for example, requires foreign suppliers to have a local partner if they want to conduct procurement in the country. In the United States' view, this procedure violates article III (1)(a)... of the GPA.<sup>70</sup> In another GPA case, the United States complained of discrimination in favour of a local Norwegian firm when a Norwegian company won a single tender to provide electronic equipment to operate an automated toll system on a ring road around the city of Oslo.<sup>71</sup>

### **3- Evaluation of all tenders equally**

As under Saudi Purchasing Law, the UK contracting authority is required to evaluate all tenders equally. It should take many factors into consideration when evaluating each tender to select contractors, for example, the lowest price, and most economically advantageous.

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<sup>68</sup> *Korea - Measures Affecting Government Procurement*, (Report of the GPA Panel), WT/DS 163/R, 1 May 2000, pp.127-8.

<sup>69</sup> United States-Section 337 of the Traffic Act of 1930, *supra* n. 72, p.42.

<sup>70</sup> Korea Measures, *supra* n. 73, pp.175.

<sup>71</sup> *United States - Norway*, (Report of the GPA Panel), 6 October 1989, (GPR/M/34).

The Evaluation Committee, which is empowered to evaluate all tenders received, is required to distinguish between the tendering procedures stated in the tender notice or the invitation to contract. In fact, UK procurement regulations provide two basic criteria for the award of a procurement contract: the lowest price and the most economically advantageous tender.<sup>72</sup> The contracting authority is under the obligation not to introduce new award procedures without cancelling existing procedures and informing tenderers of proposed changes. If it fails to do this, then it will discriminate in favour of some tenderers who will submit their tenders according to the new specification received from the contracting authority, which may assist their efforts to win the contract, while other tenderers unaware of about the new award procedure will submit their price according to the outdated information they received in the tender notice. Amending procurement information included in the tender document and informing only one or a few tenderers of this will breach the equality of evaluation principle and aggrieved tenderers have the right to challenge such amendment.

Changing the award procedure publicised in the *Official Journal* will affect tender conditions. If the contracting authority changes the award procedure from the lowest price to the most economically advantageous tender, the new specification has to be republicised in the *Official Journal*.

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<sup>72</sup> Works Regulations, Art. 20(1)(a)&(b), Supply Regulations, Art. 21(1)(a)&(b), and Services Regulations, Art. 21(1)(a) & (b).

There are two famous ECJ cases supporting the evaluation of all tenders equally, *the Storebaelt case*<sup>73</sup> and *the Walloon Buses case*.<sup>74</sup> In the *Storebaelt case*, the contracting authority breached two main equal treatment principles. First, it discriminated in favour of Danish products. It required contractors to use Danish products to the greatest extent possible which, in turn, breached the principle of equal treatment on national grounds. Second, it failed to apply equality in the award procedure due to acceptance of tenders on different terms and conditions from those published in the *Official Journal*. The ECJ held that the principle of equal treatment requires that all tenders comply with the tender conditions so as to ensure the objective comparison of all tenders submitted by various tenders.<sup>75</sup> In fact, this rule has been adopted by UK procurement regulations. Accordingly, once the contracting authority decides not to award the work in respect of the contract notice published in the *Official Journal*, it is under obligation to inform the *Official Journal* about its decision and to inform contractors of the reasons for its decision.<sup>76</sup> The regulations are silent regarding the consequences of this information. One may infer that the contractors have the right to challenge the decision of the contracting authority if they find it unjustified or unreasonable.

The *Walloon Buses case* concentrated on specification. One tenderer suggested a specification that differed from the terms and conditions the

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<sup>73</sup> Case C-249 / 89, *Commission v. Denmark (the Storebaelt case)*, [1993] ECR I-3353.

<sup>74</sup> Case C-87 / 94, *Commission v. Belgium (the Walloon Buses case)*, [1996] ECR I-2043.

<sup>75</sup> *Commission v. Denmark (the Storebaelt case)*, *supra* n. 79.

<sup>76</sup> Works Regulations, Art. 22 (4), Supply Regulations, Art. 23 (4), and Services Regulations, Art. 23(4).

contracting authority had published. The contracting authority departed from the published specifications and selected this tenderer's specification on the grounds that the authority would benefit from the new specification. The ECJ rejected the contracting authority's decision since it discriminated in favour of one tender and prevented other tenderers from a similar opportunity to revise their specification, which constituted a breach of the principle of equal treatment.<sup>77</sup> In its judgement, the court restated the central importance of the principle of equal treatment so as to afford equality of opportunity to all tenderers when formulating their tenders.<sup>78</sup>

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<sup>77</sup> *Commission v. Belgium (the Walloon Buses case)*, para. 60.

<sup>78</sup> M. Bowsher, EC Procurement Law and Change During the Tender of the Contract, [2003] Pt.1, *The International Construction Law Review*, p. 160.

## **II. Transparency**

### **Preamble**

The principle of transparency is another important principle in procurement regulations since it ensures that all procurement information is clearly known to all tenderers and contractors. In fact, most procurement regulations adopt this principle and encourage their procuring entities to protect it.<sup>79</sup> If the contracting authority does not advertise the required work or accepts tenders contrary to the procurement information published, it breaches the transparency principle. The objective of the principle of transparency is to eliminate discrimination and to open up the procurement market to all interested contractors.<sup>80</sup> It also aims to maintain effective competition by providing sufficient procurement information to all contractors to help them to contribute to procurement competition. Accordingly, the absence of transparency may preclude contractors from participating in the procurement market.

Procurement regulations commonly connect transparency to the principle of equal treatment. The two principles aim to reach a similar result: to open the procurement market by eliminating discrimination.

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<sup>79</sup> Transparency is one of the main principles of EC Procurement Directives and the UNCITRAL Model for procurement. The transparency principle was an important issue during the Singapore Ministerial Conference of the WTO in Singapore in 1996. Article 21 of the Declaration agreed to “establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement”. In 2001, during the Fourth Ministerial Conference in Doha, WTO Members agreed to launch negotiations on transparency aspects of government procurement after the Fifth Ministerial Conference. However, signatory members did not reach an agreement at the Fifth Ministerial Conference at Cancun in 2003 and consequently no decision was taken. For details see S. Arrowsmith, *Towards A Multilateral Agreement on Transparency in Government Procurement*, *International and Comparative Law Quarterly*, Vol.47, October 1998, pp. 793-816.

<sup>80</sup> S. Arrowsmith, *The EC Procurement Directives, National Procurement Policies and Better Governance: the Case for a New Approach*, (2002), *European Law Review*, Vol. 27, Issue 1, p. 5.



This section will investigate the principle of transparency under Saudi procurement regulations.

### **A. Transparency under Saudi procurement regulations**

This section will be divided into two parts. The first part will explore the difficulties which traders in general and contractors in particular face when seeking to gain access to legal information in the country. The second part will investigate transparency under the Purchasing Law.

#### **1. Difficulties gaining access to legal information**

Unfortunately, implementing the principle of transparency faces difficulties in Saudi Arabia, not only in the procurement sector but also in most aspects of commercial life. In practice, it is not easy, in general, to gain access to governmental information in the country. Although there is no clear law or governmental instruction preventing it, bureaucratic procedures make access to legal information very difficult. Official employees have an unwritten rule to prohibit their members from disclosing information in general in order to protect 'official secrets' from unauthorised release. Although there are no 'official secrets' in most procurement regulations, it is still difficult to access legal documents because they are not to be received or released without prior authorisation. One example, in fact, is the Board's refrainment from publishing its judgements. Apart from two series of judgements published in 1980, since that time no more

have been published, even though Article 47 of the Board<sup>81</sup> requires the President of the Board to publish them annually in series. It was not easy for this author to obtain the Board's judgements to assist his study, even though the President of the Board had authorised his access to them. In fact, only a few judgements were released to the author.

This situation had existed with regard to the publishing of private companies' final accounts until the Council of Ministers enacted its order no 3/232<sup>82</sup> to force private companies to publish their annual accounts in national newspapers.

Further, there are large numbers of administrative circulars and instructions relating to the procurement sector which are not gathered into one series, and it is not easy for local and foreigner contractors to gain access to them. In practice, when contractors sign procurement contracts, some include a clause stating they have looked at the Purchasing Law, its Implementing Regulations, circulars, and governmental decisions relating to it, although they will not have been issued with copies of such information.<sup>83</sup>

## **2. Transparency in the Purchasing Law**

Similar to the equal treatment principle, the Purchasing Law includes only one article requesting the contracting authority to provide 'full and consolidated information about the required work which should be made available at the same

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<sup>81</sup> Article 47 of the Board Act states that "at the end of every year, the President of the Board shall classify the judgements passed by Board Departments, print and publish the same in groups".

<sup>82</sup> The Council of Ministers enacted Order no 3/232 dated 3/4/1422 (2001).

<sup>83</sup> Riyadh Chamber of Commerce, *Barriers and Obstacles which face Procurement Contractors*, A paper submitted by the Riyadh Chamber of Commerce, October 2002, p. 24.

time to all competitors'.<sup>84</sup> This article does not contain any details of how the procurement information should be made available to all competitors. However, one can infer from various provisions of the Purchasing Law, three criteria for transparency.

- a. Publicising procurement opportunities;
- b. Publicising of tendering procedures' regulations;
- c. Publicising procurement regulations and governmental circulars; and

Each criterion will be analysed separately

**a. Publicising procurement opportunities**

In general, most public procurement regulations require procuring entities to publish all procurement opportunities in the official journals in order to unify the source of information and ensure all interested competitors are able to find available procurement opportunities. One key element of transparency is all public contracts being publicised as early as possible in a medium equally accessible to all interested parties.<sup>85</sup> In this context, the Purchasing Law requires the contracting authority to publish its procurement opportunities twice in the *Saudi Official Gazette*.<sup>86</sup> The main motive is to not only advertise all procurement opportunities, but also to ensure the contracting authority selects a proper means to publicise its procurement intentions. In this regard, it is worth mentioning that the contracting authority will breach the principle of transparency if it alters the published procurement information without notifying

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<sup>84</sup> Purchasing Law, *supra* n.3, Art. 1(b).

<sup>85</sup> P. Braun, A Matter of Principle(s)-The Treatment of Contractors Falling Outside the Scope of the European Public Procurement Directives, (2000) 9 *Public Procurement Law Review*, Issue 1. p. 43.

<sup>86</sup> Purchasing Law, *supra* n.7, Art. 2.

interested tenderers. Accordingly, it should republish new information in the *Official Gazette* and allow a sufficient period for tenderers to revise their tenders.

Article 2 of the Purchasing Law does not clarify the impact of the absence of such republication. However, the contracting authority should not continue the award procedures if it has neglected to publicise such opportunities. In practice, in addition to publication in the *Official Gazette*, the Information Ministry requires local newspapers to publish governmental advertisements, including procurement opportunities, free of charge.<sup>87</sup> However, due to the recent freezing of subsidies to local newspapers, each public agency is required to pay for its advertisements in this media source.<sup>88</sup> It is submitted that, due to modern developments in communication, procurement regulations and opportunities should be published on Internet Websites. The contracting authority should be obliged to use Internet Websites and post on them in brief, details, terms and conditions of each procurement project.

It is worth noting that the Purchasing Law does not oblige public agencies to advertise all their procurement opportunities. In fact, only procurement projects subject to open tendering procedures are required to be published in the *Official Gazette*. Direct purchasing and limited tender procedures are not covered by this regulation. In fact, the Purchasing Law<sup>89</sup> requires the contracting

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<sup>87</sup> Information Ministry Circular no. 1/2/19/115 dated 19/5/1399 AH (1977), this is because the Information Ministry had granted local newspapers annual subsidies.

<sup>88</sup> *Al-Jazirah Newspaper*, Saturday 22 April, 2004, issue 11468.

<sup>89</sup> Purchasing Law, *supra* n.3, Art. 2.

authority to send formal invitations to those contractors or suppliers selected to send their tenders to execute the required work.

Moreover, most procurement opportunities are advertised in the Arabic language. To overcome the lack of such opportunities being publicised in different foreign languages, it is suggested Saudi Embassies in foreign countries advertise procurement opportunities in the languages of those countries in which they are located, especially sophisticated or hi- tech projects which require performance by international contractors.

**b. Publicising tendering procedures' regulations**

The second criterion is to publicise tendering procedures' regulations. Tendering procedures are the core of the procurement process. They usually clarify the basis for selecting the winning tender, whether the lowest price or the most economically advantageous. In addition, the regulations also state the procedures for opening and evaluating various tenders. The Purchasing Law contains detailed explanation of the steps in the tendering procedures.<sup>90</sup> In fact, explanation clarify not only how to open and evaluate tenders but also the rank of official employees responsible for opening and evaluating such tenders.

It should be pointed out that, in principle, all procurement projects should be covered by transparency. It is submitted that the transparency principle should also apply to tendering procedures. In the direct purchasing procedure, (Chapter four will explore its regulations and the power of the contracting authority to use this procedure in detail), where the price does not exceed

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<sup>90</sup> Purchasing Law, *supra* n.3, Arts. 5(a, b, c, d, e, and f).

£150,000, the contracting authority is not required to advertise its procurement projects, only to invite three prices and select the lowest price.<sup>91</sup> In contrast, in the open tendering procedure, the contracting authority is obliged to advertise any project which exceeds £150,000 in the *Official Gazette*. Therefore, the transparency principle is less important in the direct purchasing procedure.

It is submitted that the contracting authority should publish not only the name of the winning tenderer, but also the reasons for selecting the winner.

It is also submitted that a certain period be specified, thirty days, for example, between the announcement of the winning tenderer and commencement of the performance of the contract, so as to enable tenderers who feel aggrieved to challenge the contracting authority's decision.

In addition, transparent tendering procedures require the contracting authority to ensure, first, the confidentiality of information within tenders and, second, confidentiality of tender prices. There are several elements of tenders that require confidential treatment. Some tenders may include new technical processes to be applied by tenderers, which they want to keep secret from other competitors, especially if their tenders have not been awarded contracts. Accordingly, the confidentiality of information provided by tenderers should be fully guaranteed by transparency rules. However, this does not mean that all

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<sup>91</sup> Article 3(h) of the Purchasing Law calls public agencies to procure by the direct purchasing procedure if the value of the contract does not exceed one million Saudi Riyals (£150,000). The contracting authority contacts each contractor individually. It contracts directly without inviting competing tenders on either an open or selective basis.

information has to be treated confidentially. The contracting authority should decide what information should remain confidential.

Second, transparent tendering procedures do not mean tenderers have the right to share information and predetermine the prices they will specify for procurement projects. Transparency includes an implied rule that tenderers do not select prior to tendering procedures which tenderer from among them will win the contract by rigging the prices submitted to the contracting authority. The principle of transparency will be breached if tenderers ignore its requirements and enter into unlawful agreement in order to win the contract.

**c. Publicising procurement regulations and governmental circulars**

It is a basic requirement that contractors and suppliers who intend to participate in the procurement market know the various laws and regulations which cover their rights and obligations. Accordingly, the contracting authority should bear the responsibility for making related procurement regulations available and easily obtainable.

Hence, the government should adopt a policy of improved transparency of information for government procurement. This policy should support procurement regulations by improving market information for all interested contractors and promote procurement competitions. A competitive and transparent tendering process will benefit tenderers and citizens alike, ensuring

that public funds are used in the most cost-effective manner.<sup>92</sup> As competition increases, quality improves and costs come down. Transparent procedures and procurement regulations will attract investors otherwise reluctant to invest in the local market because procedures are ambiguous.

In fact, there is urgent need for prompt and concerted action to reform the transparency procedures in the Saudi procurement market. What is needed is a uniform, transparent system that promotes competition among qualified contractors and suppliers of goods and services. This will also help the government maximise the opportunity to secure the best products at the most favourable prices.

To find solutions for the absence of transparency in Saudi procurement regulations, it is useful to review the procedures for enacting such laws and regulations and analysing their absence in general.

Usually, general policies, treaties, charters, and public concessions are issued and amended in accordance with Royal Decrees,<sup>93</sup> while the Council of Ministers has power to issue regulations relating to the execution of work for government agencies. The difference between a Royal Decree and a Council of Ministers' Regulation is simple; the Royal Decree<sup>94</sup> is issued in the name of the King as head of the Council of Ministers, whereas any minister has the right to

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<sup>92</sup> Anwarul Huda and S. Bansal, Transparency in Government Procurement, Working Paper no. 129, *Indian Council for Research on International Economic Relation*, April, 2004, p. 25.

<sup>93</sup> Council of Ministers' Act, Royal Decree no. A/13 dated 3/3/1414 (1993), Art. 20.

<sup>94</sup> Royal Decree: The Council of Ministers makes rules and regulations, voting on each article individually and then on the proposed draft as a whole. It must then refer the proposed law or regulation to the Consultative Council which will review it and vote on each article. If the majority of the members of the Consultative Council approve the draft, it will be sent to the king to be ratified. It will then be published in the Official Gazette, *Umm al-Qura*.



suggest a regulation or public order, and to send the proposal to the Council of Ministers for study. After discussion of the proposal a vote will be taken and if a majority in favour is obtained, the regulation will be issued.<sup>95</sup> Royal Decrees prevail over all other regulations, except Islamic sources.<sup>96</sup> Finally, Royal Decrees regulate laws and regulations that govern the public policy of the country, such as the public budget and public loans, while Council of Ministers' Regulations regulate the internal policy of the government. Council of Ministers' regulations usually interpret and implement Royal Decrees.<sup>97</sup> Circulars are issued by each public agency to interpret its daily work. An agency usually sends circulars to its employees only if the core of the circular relates to the internal work of the agency or to other public agencies to request them to comply with the circular's instructions or to inform them of particular steps or procedures relating to particular work. In fact, most procurement information or instructions are issued through circulars, mainly from the Finance Ministry.

A problem occurs when the Council of Ministers issues such laws or regulations. In practice, it sends one copy of such regulations to each public agency which may send it to the legal department. The public have no access to such regulations. They usually face difficulties obtaining them, as previously mentioned, even if they have been issued in the *Official Gazette*, because

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<sup>95</sup> Council of Ministers' Act, *supra* n. 93, Art. 23.

<sup>96</sup> I. Alhudaithy, "Historical Review of Saudi Administrative Contracts", 3 *Public Procurement Law Review*, 2002, p. 186.

<sup>97</sup> *Ibid*, p. 187.

governmental employees are reluctant to allow any person not belonging to the public agency access to such regulations without prior permission.

It submitted that the government should train its employees and draw their attention to the importance of disclosing legal information, since this will help people in the country to obey the laws of the land and bring their work practice and attitude into line with their underling principles. It is also submitted that each public agency should have a special area near its entrance where copies of various laws and regulations can be distributed to visitors. Moreover, it is submitted that the Council of Ministers should ensure that all public and private libraries have many copies of each law and regulation to make it easier for interested people to find them. Finally, each public agency should be required to give each contractor, especially contractors who have signed procurement contracts, a copy of each procurement regulation and a copy of all procurement circulars.

**d. Publicising preference policy and the protection of intellectual property**

Procurement regulations, especially in developing countries, include provisions which give their contractors and products preference over foreign products and contractors. Such priority may preclude foreign contractors from entering other procurement markets. The Purchasing Law in Saudi Arabia grants favourable privileges to Saudi products and contractors.<sup>98</sup> Once a foreign

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<sup>98</sup> Purchasing Law, *supra* n.3, Arts. 1(d, e) and Implementation of Purchasing Regulations (Implementing Regulations), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Arts. 1(b).

contractor signs a contract with a Saudi public agency he is required to comply with preference policies and observe them during his performance. However, some contractors are unaware of such policies before commencing their contracts. Therefore, it is submitted that the government's preference policies should be fully transparent and announced openly, so that foreign contractors are aware of the requirements and obligations to which they will be expected to adhere.

Intellectual property is also protected by several laws and regulations in the country.<sup>99</sup> Notwithstanding, neither the Purchasing Law nor its Implementing Regulations include any provision to protect intellectual property during the performance of procurement contracts. However, Article 21 of the Public Works Contract requires the contracting authority to protect any patent, trademark or invention of private firms during the contract's execution. It is submitted that the contracting authority should also explain to or inform contractors of their intellectual property rights before they sign the contract to enable them to take necessary steps to protect them. In fact, transparency regulations should cover tenderers' rights to their technical data and patents in order to protect them in the procurement process. In contrast, UK intellectual property is protected by several local and international laws and conventions. Locally, each of the main

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<sup>99</sup> Saudi intellectual property law has been divided into three sections. Each section comes under the responsibility of a different public agency. The King Abdul Aziz City for Technology and Science (KAACTS) is responsible for the implementation of Patent Law and the Ministry of Information has the right to apply Copyright Law. Further, the Ministry of Commerce is responsible for the application of Trademark Law.

subjects of intellectual property is governed by statute and supported by delegated legislation.<sup>100</sup> The main laws and regulations are:

The Registered Designs Act 1949 (as amended);

The Patents Act 1977;

The Copyright, Designs and Patents Act 1988;

The Trade Marks Act 1994;

Copyright and Rights in Databases Regulations 1997; and

Registered Designs Regulations 2001.

Internationally, the UK is a member of many international treaties and conventions which regulate intellectual property. In addition to EC legislation on intellectual property, such as the European Patent Convention of 1978, which has had a transformative effect on intellectual property rights in the UK,<sup>101</sup> the country is also a member of the World Intellectual Property Organisation (WIPO), and Trade-related Aspects of International Property Rights (TRIPS), a WTO agreement which came into force in 1995.

It should be mentioned that procurement regulations require the contracting authority not to include in technical specifications any reference to a specific make or source of goods' materials<sup>102</sup> nor any reference to trademarks, patents, types, origins or means of production.<sup>103</sup> A similar requirement is found in Article VI(3) of the GPA. However, the GPA acknowledges that particular

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<sup>100</sup> T. Hart and L. Fazani, '*Intellectual Property Law*', (Hampshire, Palgrave Macmillan, 3<sup>rd</sup> Ed., 2004), p. 4.

<sup>101</sup> J. Davis and N. Padfield, '*Intellectual Property Law*' (London, Lexis Nexis, 2<sup>nd</sup> Ed., 2003), p. 10.

<sup>102</sup> Works, Supply, and Services Regulations, Arts. Art. 8(8).

<sup>103</sup> Works, Supply, and Services Regulations, Arts. Art. 8(9).

goods or services may be supplied by a particular supplier or protected by patent or copyright. Therefore, it allows the contracting authority in the limited tendering procedure to procure...’ for works of art or for reasons connected with protection of exclusive rights, such as patents and copyrights’.<sup>104</sup>

**B. Transparency under UK public procurement contract regulations**

Transparency is fundamental to public confidence. It means a well established procurement procedure with unambiguous rules, clear allocation of responsibilities, and guidelines which clearly define the actions of the procuring entity in the procurement process.<sup>105</sup> Tenderers want to know when to send their tenders to the contracting authority, when their tenders will be evaluated, what prices have been offered, what are the reasons for accepting a winning tenderer, and why other tenderers have been rejected. Further, transparency is a means to support non-discrimination under the EC Treaty.<sup>106</sup> Transparency also supports the internal market by giving industry from other member states more confidence in the fairness of procedures.<sup>107</sup>

Transparency has wider effects under UK public procurement contract regulations than under Saudi Purchasing Law, because the latter addresses only tenderers who are eligible to conduct business in Saudi Arabia, while the former

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<sup>104</sup> GPA, Art. XV(1)(b).

<sup>105</sup> A. Kovacs, *Enhancing Procurement Practice: Comprehensive Approach to Acquiring Complex Facilities and Projects*, (Boston, Kluwer Academic Publishers, 2004), p. 177.

<sup>106</sup> Case C-247/02, *Sintesi ApA v Autorita per la Viglinaza sui Lavori Pubblici* [2005] C.M.L.R. 12, ECJ.

<sup>107</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement*, (London Sweet & Maxwell, 2<sup>nd</sup> Ed, 2005), p. 127.

requires UK public agencies to advertise their procurement opportunities throughout the E U.

UK public procurement contracts include three criteria for transparency:

- a. Publicising procurement opportunities;
- b. Publicising the regulations relating to tendering procedures;
- c. Publicising the reasons for selecting a winning tenderer and rejecting other tenderers.

Each criterion will be explained below.

**a. Publicising procurement opportunities**

Free competition is one of the main objectives of UK procurement contracts. It attempts to open up procurement markets and give all interested competitors in EC Member States the right to participate. The stipulated publication of tender opportunities aims to ensure that anyone interested in participating in the tendering procedure will come to know of the opportunity and of the time period set for presentation of tenders, and the place and conditions of tenders, through receiving lists and specification documentation relating to the procedure. In addition, there are benefits to the contracting authority; by observing the advertisement procedure, the authority expands the circle of competition and choice, enabling it to select the competitor that best fulfils the conditions of the tender in terms of value and quality of implementing the work or importing materials for it. Thus, its contracts are not bound to one group of tenderers at the expense of others. In addition, advertisement prevents

the contracting authority from limiting its contracts to a specific set of contractors presenting the excuse they were the only ones who came forward. So that publication of tender opportunities achieves its aim of granting individuals sufficient opportunity for calm thinking about their presentation of tenders, the procurement regulations have made it obligatory for each party, before advertising tenders, to prepare specification documentation containing the bid conditions and lists of goods or works required and enclosures. This documentation must be typed, stamped, and distributed with the approval of the manager of the procurement section to whoever requires it, according to the rules and at the price the contracting authority stipulates.

A publicising procurement opportunity is an important means of transparency. UK contracting authorities are required to advertise their intentions to seek tenders in the case of using open,<sup>108</sup> restricted<sup>109</sup> or negotiation tendering procedures.<sup>110</sup> The regulations give contracting authorities different channels to advertise their procurement opportunities, such as the *Official Journal*, the EC Tender Electronic Daily databank, local newspapers, and Internet Websites. They are required to publish a 'contract notice'<sup>111</sup> in the *Official Journal of the European Union*.<sup>112</sup> In order to assist free competition and to encourage all interested contractors to participate in the EC procurement market, the

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<sup>108</sup> Works Regulations, Art. 11, Supply Regulations, Art. 11, and Services Regulations, Art. 11.

<sup>109</sup> Works Regulations, Art. 12, Supply Regulations, Art. 12, and Services Regulations, Art. 12.

<sup>110</sup> Works Regulations, Art. 13, Supply Regulations, Art. 13, and Services Regulations, Art. 13.

<sup>111</sup> Article 2(1) of the Works Regulations defines a contract notice as a notice sent to the *Official Journal* in accordance with regulation 11(2), 12(2), 25(2) or 26(23).

<sup>112</sup> Works Regulations, Art. 11(2) and 30(1), Supply Regulations, Art. 11(2), 27(1), and Services Regulations, Art. 11(2), 29(1).

regulations stipulate that contracting authorities are under obligation to publish their intention to seek offers in full in the original language of the *Official Journal* and through the Tender Electronic Daily (TED) databank.<sup>113</sup> In order to treat all EC tenderers equally and to give them similar opportunity to learn of the procurement information at the same time and not to discriminate in favour of local tenderers, the regulations prevent UK contracting authorities from placing a contract notice in their local press before publishing such notice in the *Official Journal*.<sup>114</sup> In contrast, the Purchasing Law does not include any provision preventing the contracting authority from advertising its intention to seek tenders in the local press before publishing such intention in the *Official Gazette*. Indeed, procurement opportunities may be published by any means, including the weekly Saudi *Official Gazette*.<sup>115</sup>

**b. Publicising regulations relating to tendering procedures**

Publicising the tendering procedure is another means of transparency. It is necessary for fair and open competition between those wishing to enter into a contract with the contracting authority since not all those wishing to enter into a contract may know of the contracting authority's need for tenders.

UK regulations require transparency in the contracting authority's decisions throughout the tendering procedure, from receiving tenders through to

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<sup>113</sup> *Ibid*, Art. 30(1), Supply Regulations, Art. 27(1), and Services Regulations, 29(1).

<sup>114</sup> *Ibid*. The new EC Directive adopts similar regulation in Art. 36(5).

<sup>115</sup> To compare the *Official Journal of the European Community* with the Saudi *Official Gazette*, *Um-AlQura*, the European journal, is published daily and divided into three parts. The first is concerned with legislation, the second deals with notices, communications and draft legislation, and the third contains information on public procurement contracts. It is published in all official languages of the community. *Um-AlQura*, in contrast, is published weekly only in the Arabic language. It includes legislation, government advertisements relating to change in citizenship as required by public agencies, and some legislation related to procurement contracts.



selecting a successful tenderer to carry out the work, or canceling the tendering process. The ECJ held that procuring entities must provide those participating in a tendering procedure with prompt and precise information on the conduct of the procedure.<sup>116</sup> Consequently, transparency assists the authority in proving that it is following the regulatory requirements and is not discriminating against any tenderer, and gives any aggrieved tenderer the right to challenge the decision of the authority.

Once a contracting authority decides to contract out the work, it must send a contract notice to the *Official Journal* "as soon as possible"<sup>117</sup> using the most appropriate means".<sup>118</sup> The regulations also oblige the contracting authority to retain evidence of the date of dispatch of the contract notice.<sup>119</sup> The notice should indicate the party to whom the bid should be sent, the last date for presentation, the type of work required, the starting and final deposit values, the price of a copy of the bid conditions, and any other details the contracting authority views as relevant to and necessary for the work. The regulations give the contracting authority flexibility to send the notice by telex, telegram or telefax in the case of accelerated procedures.<sup>120</sup> In similar manner, the new EC Public Sector Directive allows the contracting authority to publish such notice on

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<sup>116</sup> Case T-203/96, *Embassy Limousine and Services v Parliament* [1998] E.C.R. II-4239, para. 13.21.

<sup>117</sup> Works Regulations, Art.9, Supply Regulations, Art. 9(1), and Services Regulations, Art. 9(1).

<sup>118</sup> Works Regulations, Art.30(1), Supply Regulations, Art. 27(1) and Services Regulations, Art. 29(1).

<sup>119</sup> Works Regulations, Art.30(3), Supply Regulations, Art. 27(3) and Services Regulations, Art. 29(3).

<sup>120</sup> Works Regulations, Art.12(2), Supply Regulations, Art.12(2), and Services Regulations, Art. 12(2).

its Internet website and obliges the authority to send an electronic copy in a form specified by the regulations.<sup>121</sup>

In the open tendering procedure, as mentioned in chapter five, the contracting authority is under an obligation to fix the last date for receiving tenders which must be not less than 52 days from the date of sending the notice to the *Official Journal*.<sup>122</sup> In the case of public works, the contracting authority may extend such period in order to give contractors an opportunity to inspect the site on which the work under the contract is to be carried out.<sup>123</sup>

The contracting authority is empowered to choose either the lowest price or the most economically advantageous tender as the award criterion. The regulations do not specify conditions for choosing either approach, except that the public authority must publicise in the contract documents or in the contract notice which approach it will select. If the contracting authority fails to specify in the contract notice that the most economically advantageous tender will be selected, then it must choose the lowest price as the award criterion.<sup>124</sup>

**c. Publicising the reasons for selecting a successful tenderer and rejecting other tenderers**

It is usual practice in different procurement systems to inform the successful tenderer that he has won the contract. Such practice takes different

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<sup>121</sup> EC Public Sector Directive, Art. 35(1)(3).

<sup>122</sup> Works Regulations, Art.11(3), Supply Regulations, Art.11(3), and Services Regulations, Art. 11(3). In restricted procedure the period will be 37 days.

<sup>123</sup> Works Regulations, Art.12(2), Supply Regulations, Art.12(2), and Services Regulations, Art. 12(2).

<sup>124</sup> *Case C- 87/94, Commission v. Belgium (the Walloon Buses)*, [1996], ECR, I-2043, at para. 89.

forms in various procurement systems. Under the Saudi Purchasing Law, for example, the contracting authority usually sends a recorded letter to the winner. Under UK regulations, the practice is quite different. The UK contracting authority is required to do two things: to inform the successful tenderer that he has been awarded the contract and to send a notice of the result of the tendering process to the *Official Journal* within 48 days of the award decision.<sup>125</sup> It seems obvious that the contracting authority should publish not only the name of the winner, but also the outcome of the evaluation process and the reasons for selecting the winner. However, the contracting authority is not allowed to publish the award decision if such information would impede law enforcement or be contrary to the public interest.<sup>126</sup>

Publishing the award procedure in the *Official Journal* gives new tenderers confidence to compete for public contracts. It creates fair and healthy competition, leading to higher quality levels and reduced costs.

In addition to publishing the award decision, the contracting authority is required to 'inform an unsuccessful (tenderer) within 15 days of his written request of the reasons why he was unsuccessful'.<sup>127</sup> This requirement may discourage the purchaser from acting unlawfully, and aid providers in deciding whether to challenge decisions.<sup>128</sup> Further, the contracting authority, as

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<sup>125</sup> Works Regulations, Art.21(1), Supply Regulations, Art.22(1), and Services Regulations, Art.22(1).

<sup>126</sup> Works Regulations, Art.21(2), Supply Regulations, Art.22(2), and Services Regulations, Art.22(2).

<sup>127</sup> Works Regulations, Art.22(1), Supply Regulations, Art.23(1), and Services Regulations, Art.23(1).

<sup>128</sup> S. Arrowsmith, *supra* n. 107, p. 797.

mentioned in chapter four, is under obligation to inform an ineligible<sup>129</sup> tenderer of the reasons why it viewed them as ineligible. Giving reasons for the contracting authority's decision serves the interest of the tenderer affected by the decision. Such transparency will convey to the tenderer a clear idea of why the contracting authority took such a decision and enable him to decide whether to challenge the decision. Such disclosure will also assist the court if reviewing the decision.

#### **IV. A comparative analysis**

In addition to a comparative analysis aforementioned, this section will examine similarities and differences between the discussed procurement principles under the two procurement systems.

In general, equal treatment is an essential principle under the two systems, which emphasises that all interested contractors must be treated equally. Notwithstanding, the Purchasing Law contains only a general provision requesting the contracting authority to apply such treatment in its procurement projects. Official employees and contractors are not provided with any guidelines to follow in order to satisfy the equality principle. Also, this provision does not clarify the impact of the absence of the equality of treatment. It is left to the Board to assess the impact of such absence. UK procurement contract regulations have a wider effect than those under the Saudi system because they

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<sup>129</sup> According to Article 14(1) of the regulations the contracting authority may treat a tenderer as ineligible if he is bankrupt, has been convicted of a criminal offence, has not paid his tax, or is not registered on the trade register of member states.

require not only UK and EC contractors to be treated equally but also international contractors whose countries are signatories to the GPA. Further, the absence of the equality treatment may cause nullification of the procurement contract under UK regulations.

A similarity between the two systems is that procurement regulations in the two countries preclude the contracting authority from awarding contracts to contractors whose specifications differ from those advertised. Each system requires contracting authorities to evaluate tenders according to the requirements of the specification sent to all tenderers. The contracting authority will breach the principle of equal treatment if it accepts a different specification from a particular tenderer, even if such a specification will be advantageous to the contracting authority.

One difference between the two systems occurs in the evaluation process. Under the Purchasing Law contracting authority may exclude tenderers from the evaluation process if many tenders have been submitted and the contracting authority has selected the five lowest tenders. In fact, this practice breaches the equality of evaluation because many tenderers will be prevented from participating in the procurement process for which there is no legal justification. In contrast, all tenders received by UK public agencies will be given careful consideration during the evaluation procedure.

Another difference is the provision of open competition. Procurement competition under UK procurement regulations is open not only to EC

contractors, but also to contractors whose countries are signatories to the GPA. UK contracting authorities are bound to satisfy the requirements of EC Procurement Directives and the GPA. The Saudi Purchasing Law confines the procurement competition to those tenderers whose firms are registered with the Ministry of Commerce according to the Saudi Company Act.

Application of the transparency principle is different in the two systems. While UK procurement contract regulations views this principle as a main objective, Saudi Purchasing Law, on the other hand, regards it as less important. The following examples will clarify this issue. First, UK procurement contract regulations required transparency in the contracting authority's intention to seek offers and its decision to choose a successful contractor and reject other tenderers, while Saudi Purchasing Law does not require the contracting authority to advertise its decisions to select or reject a tender. Second, UK procurement contract regulations give the contracting authority flexibility to use modern technology to advertise procurement opportunities and tender notices, such as sending the notice by telex, telegram or telefax in the case of accelerated procedures and publishing such opportunities through the Internet. Under Saudi Purchasing Law, procurement opportunities are published only in the *Official Gazette* or in local newspapers. There is no regulation or circular allowing the contracting authority to use any accelerated procedure, such as telex or telefax, or publish invitations to tender on its Web pages. Despite this, there is no

problem if the contracting authority uses these means, because the aim of the invitation to tender is to inform the public of the procurement contract.

Finally, neither the Purchasing Law nor UK procurement contract regulations state that the tender is nullified if it is not advertised in the manner that the law has stipulated. However, nullification arises if the contracting authority does not respect the set period for advertisement, or if it does not convey to one of the tenderers the full conditions for the tender. If any of the tendering documents are omitted in the published advertisement about the tender, the procurement process will be nullified and any contract made under it cancelled. This is because such documents represent the minimum information needed by competitors, as they will rely on it in deciding to tender, and when preparing and presenting their bids.

## **Summary**

This chapter has examined the most important principles of procurement contracts under Saudi and UK regulations. It has focused on three principles: equal treatment, and transparency. Under the equal treatment principle, all interested contractors have a right to be treated equally. This requires the public authority to justify its procurement policies and prohibits it from engaging in arbitrary conduct. It must not discriminate between contractors on arbitrary grounds. However, the notion of equality cannot be applied in all circumstances. In fact, in order for the principle of equal treatment to be effective, contracting

authorities should take into account differences between firms and the work required.

The comparative analysis of the two systems shows that the Purchasing Law does not contain guidelines which the contracting authority must follow in order to comply with the obligation to equal treatment towards tenderers. In contrast, UK procurement regulations require public authorities to uphold the equality principle between tenderers and to adopt such principle as one of the main means to support non-discrimination. Accordingly, UK contracting authorities are required to justify their tendering decisions to aggrieved tenderers in order to ensure they do not discriminate in favour of a particular tenderer.

Moreover, equal treatment under UK procurement regulations comprises two types of obligations: nationally as between the UK and EC contractors, and internationally as between the UK and other signatories to the GPA, whereas equality under the Purchasing Law applies to only procurement contractors in the territory of Saudi Arabia.

Implementation of the transparency principle in the procurement sector in Saudi Arabia is limited. Although there is no written rule precluding public employees from disclosing legal and governmental procurement information, it is not easy for ordinary people, tenderers, and contractors to gain access to such information without prior authorisation.

In procurement the Purchasing Law includes only one general article requiring contracting authorities to publish information about procurement



projects in the *Official Gazette*. However, this article does not specify how the procurement information should be made available to various competitors, nor clarify the legal impact of the absence of such information. Saudi law makers should take steps to force contracting authorities to exercise transparency in their procurement decisions, particularly to clarify their decisions for selecting a successful contractor and rejecting other tenderers. Further, the Board should publish its judgements annually in series.

An in-depth discussion of some of the most important principles of procurement will assist understanding of the rights of contractors before the award of a contract. This will be provided in the next chapter.

## Chapter Five

# Rights of Tenderers before the Award of a Contract

## **Chapter Five: Rights of Tenderers before the Award of a Contract**

The selection of contractors to perform the contract is an important procedure. A wrong choice might lead to execution of the contract facing difficulties and result in a dispute being brought before the court. A contracting authority is required to take some preliminary steps before selecting a successful tenderer. It must draw up a detailed technical specification, set out the rights and obligations of the parties concerned, clarify the methods by which the contractors for the work will be chosen, and advertise its procurement contracts in order to invite interested tenderers to submit their tenders.

Before the submission of his tender, the tenderer must make a careful study of the contract documents. He must be realistic when considering every single term in the bid, for example, specifications, duration of the contract, methods of payment. He should also estimate his likelihood of success compared to that of other competitors who might compete for the award of the contract. Based on such study and his procurement experience, and taking into account his financial and technical abilities, he should then decide whether to submit his tender to carry out the work or not. In this regard, a main problem is some Saudi contractors' failure to take sufficient care in studying work documents. A survey by the Riyadh Chamber of Commerce<sup>1</sup> showed that 12% of local contractors entered into procurement contractual

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<sup>1</sup> Riyadh Chamber of Commerce, *Barriers and Obstacles Which Face Procurement Contractors*, A paper submitted by the Riyadh Chamber of Commerce, October 2002, p. 15.

obligations without studying the terms of the contract or the market conditions.

As indicated in the structure of the study outlined in Chapter One, it is divided into three parts, the second part of which commences with this chapter. The first part of this chapter will shed a light on characteristics and general principles of public contracts, particularly the preparation of specifications, the advertising of procurement opportunities, actual tendering procedures, and the award of the contract. The final part of the chapter explores the methods of obtaining tenders under Saudi and UK public procurement contract regulations

Before proceeding to the preliminary steps which the contracting authority must take before awarding a contract, the definition of a 'contractor' will be discussed in greater detail than that presented in Chapter One, section I.

#### **A. Definition of a 'contractor'**

Chapter three distinguished between public and private contracts. This section will discuss the meaning of a 'contractor'. The Purchasing Law does not define a 'procurement contractor'. This lack is indicative of the general absence of definitions in the Purchasing Law, which leaves the door open for every interested firm to enter the Saudi procurement market. In fact, during the first national development plan, 1975-1980, private firms, either specialists in procurement or established in area not related to procurement, as aforementioned in chapter two, were encouraged to participate in building

the infrastructure of the country. However, the Classification Act<sup>2</sup> enacted in 1980 classifies procurement contractors according to their capital and the specialist work they are registered to perform to distinguish them from firms registered in the Company Department of the Ministry of Commerce to carry out work not related to procurement. The Classification Act requires firms to be specialists in certain types of procurement and according to their classification level limits their participation to projects of a certain value. Such classification is essential before a firm can present a bid for a government contract.

Classification specifies the scientific and technical abilities of the contractor, his financial and managerial situation, and his ability to operate in the contracting fields of construction, maintenance, etc.

As a consequence, a 'contractor' in this thesis is defined as a private firm which is registered to provide procurement activities and can be selected by a public agency, either directly or through the tendering process, to perform the procurement contract until its completion. This thesis also uses the terms 'tenderer' or 'bidder' to describe a private firm working in the procurement market, invited by the public agency to submit its offer to carry out work in the form of a tender. This term 'tender' is used more frequently than 'bidder'. The terms 'contractor' and 'tenderer' clearly differ in meaning. The term 'tenderer' describes a firm which receives tender documentation and prepares its tender according to this, then sends it to the contracting authority in order for the latter to evaluate all tenders received and select the

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<sup>2</sup> Circular no. 255/ C dated 21 / 4 / 1413 AH (1983).

best tender according to the lowest price or most economically advantage tender criterion. Once the contracting authority has chosen a successful tender, the tendering procedure moves to the next stage, i.e. where the contracting authority signs a procurement contract with the chosen tenderer. Signing the contract is the end of the tendering stage and the start of the contracting stage. During the tendering stage any interested tenderer has the right to send his tender, with certain exceptions, as will be indicated later in this chapter, while in contracting stage, only one firm, the 'successful tenderer' has the right to perform the contract.

In contrast, unlike Saudi Purchasing Law, part I of each UK procurement contract regulations<sup>3</sup> contains definitions and interpretation for many terms and terminologies included in the regulations. The regulations define a contractor as a person who sought or seek or would have wished to be the person to whom a public works contract is awarded.<sup>4</sup> The regulations stipulate that such a contractor should be a national or belong to any EC member state.<sup>5</sup> In order for an EC or UK firm to enter the UK procurement market, it must first be registered on the trade register of the member state in which the contractor is established under the conditions laid down by the state.<sup>6</sup> If a contractor fails to register his firm he will be viewed as ineligible to participate in the procurement process and therefore prevented from

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<sup>3</sup> The Public Works Contract Regulations 1991(Works Regulations), no. 2680, Art. 2(1), The Public Supply Regulations (Supply Regulations), 1995, no. 201, Art. 2(1), and Public Services Contract Regulations (Services Regulations), 1993, no. 3228, Art. 2(1).

<sup>4</sup> J. Paradissis, Planning Agreement and EC Public Procurement Law, 2003, *Journal of Planning & Environment Law*, p. 672.

<sup>5</sup> Works Regulations Art. 4(1)(a)(b). Article 4(1)(a)(b) of the Supply and Services Regulations adopt a similar definition.

<sup>6</sup> Works Regulations Art. 14(1)(i), Supply Regulations Arts. 14(1)(i) and Services Regulations Art. 14(1)(i).

procuring. UK and EC contractors may register on the official list of recognised contractors<sup>7</sup> which paves their way to participation in the procurement market. To emphasise the importance of the official list of recognised contractors, the new Public Sector Directive provides for a central system of certification of private and public organisations for the purpose of providing evidence of financial and economic standing as well as level of technical capacity in public procurement selection and qualification procedures.<sup>8</sup>

## **B. The preparation of specifications**

To award a contract, the contracting authority's first step is to design detailed specifications for the particular project. Specifications are the descriptions that tell the seller exactly what the buyer wants to purchase<sup>9</sup>. One important reason for designing specifications is to provide a uniform quality standard as a basis for comparing competitive bids.

In general, specifications are based on international standards, national technical codes, or national standards. However, problems often occur as a result of unclear specifications. Most procurement regulations emphasise therefore that specifications must be clear, concise and unambiguous. Moreover, the specification must not be written around a specific product since this might limit the competition. Hence, a designer should attempt to make specifications as close as possible to industry standards. If any special

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<sup>7</sup> Works Regulations Art. 18, Supply Regulations Art. 19 and Services Regulations Art. 19.

<sup>8</sup> C. Bovis. The New Public Procurement Regime of the European Union: A Critical Analysis of Policy, Law and Jurisprudence,(2005), *European Law Review*, Vol. 30, pt 5, p. 612.

<sup>9</sup> D. Dobler and D. Burt, *Purchasing and Supply Management: Text and Cases*, Sixth Edition, 1996, p.162.

dimensions or features are required, every effort should be made to attain these by designing them as additions or alterations to standard parts.<sup>10</sup>

The rules which govern the preparation of specifications under Saudi Purchasing Law and UK procurement contract regulations will be discussed below.

### **1. Preparation of Specifications under Saudi Purchasing Law**

Before inviting tenders, the contracting authority is required to design detailed specifications for the required work.<sup>11</sup> Government practice in drafting specifications indicates that the preparation of technical specifications is based on the performance and design of a given product. Specifications for construction, for example, are based on performance. On the other hand, specifications for goods are based on the design of such goods. For example, specifications for cars, computers, or furniture are based on the design features of such items.

Article 1(a) of the Implementing Regulations prevents the contracting authority from designing specifications around a specific product. It must not refer to a specific type, description or number quoted in a producer's catalogue, nor prepares specifications conforming to specific trade marks<sup>12</sup> in order to ensure all interested tenderers participate in the tendering process.<sup>13</sup>

In 1980, the Ministry of Finance noticed that some consulting companies hired for preparing specifications and conditions laid down certain stipulations designed to restrict the materials used to those manufactured in a

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<sup>10</sup> *Ibid.*, p.168

<sup>11</sup> Implementation of Purchasing Regulations (Implementing Regulation), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 1(a).

<sup>12</sup> *Ibid.*, Art. 1(a).

<sup>13</sup> Circular no. 2550/17 dated 2/9/1405 AH (1985).



specified country.<sup>14</sup> This was a violation of Article 1(a) of the Implementing Regulations, mentioned above. It also violated Article 4 of the Purchasing Law, which requires contracting authorities to give opportunities in their dealings to the greatest possible number of those qualified in the activity which is the subject matter of the dealing, so that their dealings will not be confined to certain specific contractors.

It is worth mentioning that Article 1(a) of the Implementing Regulations might be in conflict with Royal Order no. 18301 dated 27/7/1397 AH (1977), which gives national products priority over imported products. The Royal Order requires the contracting authority to give preference to products of Saudi origin and states that consulting departments and companies must, when preparing the specifications of government projects, give priority to the products of national industry.<sup>15</sup> However, there is an implied condition in the Royal Order that no mention must be made of a particular brand name or trade mark.<sup>16</sup>

The design of specifications is entrusted to the Saudi Arabian Standards Organisation (SASO). It is responsible for promoting national industry through the application of a mark system on products that normally conform to Saudi standards.<sup>17</sup> In addition, it has the right to adopt and approve international standards for all commodities and products.<sup>18</sup>

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<sup>14</sup> Circular no. 12 / 10882 dated 29 / 5 / 1400 AH (1980).

<sup>15</sup> Royal Order no. 18301 dated 27 / 7 / 1397 AH (1977) and the Council of Ministers' Decision no. 139 dated 25 / 6 / 1407 AH (1987).

<sup>16</sup> Implementing Regulations, *supra* n. 11, Art. 1(b).

<sup>17</sup> Saudi Arabian Standards Organisation, Royal Decree no. M / 10 dated 3 / 3 / 1392 AH (1972), Art.4.

<sup>18</sup> *Ibid.*, Art. 10 Saudi Arabian Standards Organisation, Royal Decree no. M / 10 dated 3 / 3 / 1392 AH (1972), Art.4.

The SASO tries to eliminate barriers to trade by joining many regional and international standardisation organisations and working with them to modernise the domestic industry and facilitate its access to world markets through the application of the registration system according to the International Standards Series (ISO 9000),<sup>19</sup> International Organisation for Standardisation (ISO), and the International Organisation for Legal Metrology (OIML). In practice, most contracting authorities employ an international consultant to draw up specifications for sophisticated projects. However, recently, the country has changed its reliance on international firms to draw up specifications and established a national institute in King Saud University to undertake this task and draw up specifications for large projects.<sup>20</sup> The Prince Abdullah Institution for Study and Research has been delegated to undertake the research for a new King Khaled University project which has just been established in Abha city in the south of the country. Following its establishment, the Institution called for tenders to draw up specifications for the university project. From more than one hundred local and international competitors, a local firm was awarded the contract.<sup>21</sup>

### **Changing specifications**

Regulations governing public contracts,<sup>22</sup> as mentioned in chapter 4, give the parties to the contract the right to change the specifications, either by agreement or unilaterally. Changing the specifications is common practice

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<sup>19</sup> Saudi Arabian Standards Organisation, *supra* n. 17, Art. 12

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<sup>21</sup> *Al-Jazirah Newspaper*, issue 11108, Tuesday 18 March, 2003.

<sup>22</sup> S. Al-Tamaui, *General Principles of Administrative Contracts* (Cairo, Dar Al-Feker Al-Arabi, 5<sup>th</sup> Edition, 1991), p. 211.

in procurement contracts, especially those relating to construction projects.<sup>23</sup> Sometimes the Architect advises the contracting authority to change the specifications of the contract in the light of new technology or to apply improved specifications. The contractor has the right to be compensated if a change in a specification costs him more than the price initially agreed.<sup>24</sup> Under the Purchasing Law, there is no requirement to advertise such a change, or to institute new award procedures. It is within the contracting authority's power to send a variation order to the contractor to inform him of the new specifications.<sup>25</sup>

In practice, government agencies usually pay the contractor for such variation directly without a court order.<sup>26</sup> If the contractor does not accept the variation order, he may challenge it before the Board. In addition, the contractor has the right to extend the contract period if the variation forces him to extend the period for executing the contract.<sup>27</sup> Chapter six will discuss non-compliance with specifications in more detail.

The use of national standards in specifications is not intended to be an obstacle to international trade. Specifications provide a basis for the contracting authority to indicate what it wants from bidders. In the drawing up of specifications, the intention is to ensure the government's needs are met. However, languages, customs, and practices differ from one country to

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<sup>23</sup> S. Furst and V. Ramsey, *Keating on Building Contracts*, (London, Sweet & Maxwell, 7<sup>th</sup> edition, 2001), p. 106.

<sup>24</sup> *Case no. 591/ 1 / K* dated 1416 AH, (1996).

<sup>25</sup> Finance Ministry circular no. 17/ 31427 dated 15/7/1409 AH (1989).

<sup>26</sup> A. Al – Wehaiby, "The Organizing Principles for Administrative Contracts and its Applications in Saudi Arabia", (1<sup>st</sup> Edition, Riyadh, 2002), p. 216.

<sup>27</sup> Purchasing Law, Royal Decree no: M / 14 dated 7 / 4 / 1397 AH (1977), Art. 26.

another, procurement regulations may also differ. Drawing up specifications to satisfy a particular custom or in a different language is not a direct barrier to international trade. International standards cannot always satisfy different languages and cultures. Saudi standards for building, for instance, differ from British standards because of the climate of the two countries, their geographical zone and culture. Thus, in practice, UK contractors might find Saudi specifications for roads and school buildings, for example, differ from the UK specifications. However, designing such specifications does not mean the Saudi contracting authority is putting obstacles or barriers in the way of foreign contractors, or preventing them from participating in the Saudi procurement market.

## **2. Preparation of Specifications under UK Procurement Regulations**

In practice, UK public authorities must not design its specifications in order to favour its local firms and products or prevent EC contractors from participating in its procurement activities.

Most of the standards in use in the United Kingdom are those approved by the British Standards Institution (BSI). Many of the standards adopted are based on those of European and international standardisation bodies which seek to harmonise standards on an international basis.<sup>28</sup>

Unlike the Saudi Purchasing Law, UK procurement regulations provide a series of definitions of the terms used in technical specifications.<sup>29</sup>

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<sup>28</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement*, (London Sweet & Maxwell, 1996), p. 576.

<sup>29</sup> Works Regulations, Art. 8 (1), Supply Regulations, Art. 8 (1), and Services Regulations, Art. 8 (1).

Therefore, the rules governing technical specifications are identical in works, supply and service procurement contract regulations.

Under the procurement regulations, technical specifications must be defined by reference to "any European specifications which are relevant".<sup>30</sup> Therefore, the UK contracting authority is under an obligation to use European specifications. This stipulation was implemented with a view to eliminating discrimination based on the description of national standards.<sup>31</sup>

The term 'European specifications' covers three types of standard:

- (i) British standards implementing European standards;
- (ii) European technical approvals; and
- (iii) Common technical specifications.<sup>32</sup>

Notwithstanding the regulation requiring use of European specifications, contracting authorities in all Member States have the right to use their national standards as an exception to this regulation. A UK contracting authority may refer to British technical specifications if European specifications are incompatible with equipment already in use.<sup>33</sup> Also, it may use relevant national specifications if European specifications might entail disproportionate costs or disproportionate difficulties.<sup>34</sup> Further exceptions apply where it is technically impossible to establish conformity in a satisfactory manner.<sup>35</sup>

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<sup>30</sup> Works Regulations, Art. 8 (3), Supply Regulations, Art. 8 (3), and Services Regulations, Art. 8 (3).

<sup>31</sup> C. Bovis, "An Impact Assessment of the European Public Procurement Law and Policy", (1999) *Journal of Business Law*, p. 127.

<sup>32</sup> Works Regulations, Art. 8 (1), Supply Regulations, Art. 8 (1), and Services Regulations, Art. 8 (1).

<sup>33</sup> Works Regulations, Art. 8 (4) (c), Supply Regulations, Art 8/4/c, and Services Regulations, Art. 8 (4) (c).

<sup>34</sup> Works Regulations, Art. 8 (4) (c), Supply Regulations, Art 8/4/c, and Services Regulations, Art. 8 (4) (c).

<sup>35</sup> S. Arrowsmith, *supra* n.28, p. 591.

When a contracting authority decides to use one of these exceptions, it is under an obligation to "state in the contract notice or in the contract document the reason for doing so".<sup>36</sup> It is prohibited for a procurement contract to refer to a particular trademark, patent, type, or place of origin<sup>37</sup> unless such reference is justified by the subject of the contract.<sup>38</sup> Without such justification, Member States are prohibited from introducing into contractual clauses technical specifications which mention products of a specific make or source, or a particular process, and which therefore favour or eliminate certain undertakings.<sup>39</sup> In this matter, the specification must be accompanied by the words "or equivalent".<sup>40</sup> Absence of such wording is a violation of the procurement regulations. In the *Dundalk* case<sup>41</sup>, for example, a Spanish company was wrongly excluded from the tendering process because the specifications for the supplied water pipes did not comply with Irish Standards Specifications (ISS) as requested in the invitation notice. The Court of Justice found the Irish contracting authority guilty of violating Art. 30 of the Treaty. The court condemned this requirement, since it ruled out the possibility of taking into consideration any tender based on another technical standard recognised as affording equivalent safeguards.<sup>42</sup>

In another instance, the European court held in the UNIX case that by failing to add the words "or equivalent" after the words "UNIX system", the

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<sup>36</sup> Works Regulations, Art. 8 (6), Supply Regulations, Art 8 (6), and Services Regulations, Art. 8 (6).

<sup>37</sup> Works Regulations, Art. 8 (9), Supply Regulations, Art 8 (9), and Services Regulations, Art. 8 (9).

<sup>38</sup> Works Regulations, Art. 8/10/a, Supply Regulations, Art 8/10/a, Services Regulations, Art. 8 (10)(a)

<sup>39</sup> *Case 45/87, Commission v. Ireland (Dundalk case)*, (1988), *E.C.R.* 4929.

<sup>40</sup> Works Regulations, Art. 8 (10)(b), Supply Regulations, Art 8 (10)(b), and Services Regulations, Art. 8 (10)(b).

<sup>41</sup> *Case 45/87, Commission v. Ireland (Dundalk case)*, (1988), *E.C.R.* 4929.

<sup>42</sup> J. Winter, "Public Procurement in the EEC", (1991) 28 *Common Market Law Rev.*, 744.

contracting authority had failed to fulfil its obligations under Article 7 (6) of the Council Directive 77/62 and Article 30 of the Treaty.<sup>43</sup>

On September 9<sup>th</sup>, 1999, the Commission sent a reasoned opinion to the UK because in its view a framework arrangement for a public Safety Communication Project violated a provision of the Directive on the public procurement of services, supply, works and EC Treaty rules on the free movement of goods (Article 28). The problem was that the UK interpreted the public procurement directives in such a way that contracting authorities were not obliged to verify whether products or services not manufactured according to the European standards specified in tender documents were nevertheless equivalent. Instead, contracting authorities were allowed to reject products or services which were genuinely equivalent simply because they were not manufactured in accordance with the relevant European standards. The Commission maintained that the public procurement directives required references to European standards where they exist, so as to ensure that technical specifications are defined by references to standards which are common, transparent and publicly available. If the contracting authority refuses to examine whether or not the products or services offered are genuinely equivalent to products or services manufactured in accordance with European standards, then this constitutes a violation of the public procurement directives and of EC Treaty rules on the free movement of goods.

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<sup>43</sup> Case 359/93, *Commission v. Netherlands (UNIX case)*, (1995), E.C.R. I, 157, Para. 23.

There is no express provision allowing the contracting authority to alter the specifications after the advertisement of the contract. The practice of the contracting authority and the need to keep up with new technology, as mentioned above, permit the contracting authority to "change the specifications provided that such changes is not "substantial", in the sense that the specifications are so altered as to attract providers who might not considered bidding for the original contract."<sup>44</sup>

In addition, the contracting authority should not accept tenders which do not comply with the specifications<sup>45</sup> because such acceptance would constitute a breach of Article 30 of the EC Treaty.<sup>46</sup>

Further, UK procurement contract regulations did not previously require precise specifications in open or restricted tendering procedures. However, to remedy this lack, the new Public Procurement Sector Directive stipulates that specification should be sufficiently precise to allow tenderers to determine the subject-matter of the contract and allow contracting authorities to award the contract.<sup>47</sup>

According to the GPA provisions, specifications should be based on either international standards, national technical regulations, or recognised national standards,<sup>48</sup> and GPA members are allowed to choose one of the three. Article VI(1) also emphasises that specifications 'shall not be prepared, adopted or applied with a view to, or with the effect of, creating obstacles to

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<sup>44</sup> S. Arrowsmith, *supra* n. 28, p. 617.

<sup>45</sup> *Case 243/89, Commission v. Denmark "Storebaelt", ECR (1993).*

<sup>46</sup> *Case 359/93, Commission v. Netherlands (UNIX case), (1995), E.C.R., I. 157, Para. 28.*

<sup>47</sup> New Public Sector Directive, Art. 23.

<sup>48</sup> GPA, Uruguay Round Annex 4: Plurilateral Trade Agreements, April 15, 1994 Government Procurement Agreement (GPA), GATT, available on <http://www.wto.org> and LEXIS, GATT file, Art. VI(2).



international trade, nor have the effect of creating unnecessary obstacles to international trade.<sup>49</sup> Designing specifications in accordance with national standards is a mechanism for excluding foreign contractors from participating in the local market.<sup>50</sup> Therefore, in addition to Article VI(1)'s requirements that specifications should not create obstacles to international trade, the national treatment principle, mentioned in chapter three, prohibits the use of specifications which have a discriminatory effect, even if the signatory's member intention not to discriminate.<sup>51</sup> These articles required each signatory member not to stipulate specifications that might differ from those of other GPA members. However, in order to retain its national standard, a signatory member is allowed to accept equivalent specifications that meet its national standard. In this regard, in sole and limited tendering procedures when a contracting authority invites one or several tenderers to send their bids, it is under obligation not to design its specifications in a way that might limit the competition to certain tenderers and only exclude other tenderers from participating in the competition. It should give other tenderers opportunity to submit equivalent specifications.<sup>52</sup>

### **C. Preparation of bidding documents**

In addition to designing the specification as aforementioned, the contracting authority must prepare other bidding documentation which includes all the procurement information necessary to prepare a tender for

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<sup>49</sup> *Ibid.*, Art. VI (1).

<sup>50</sup> A. Reitch, *International Public Procurement Law: the Evaluation of International Regimes on Public Purchasing*, (London, Kluwer Law International, 1998), p.123.

<sup>51</sup> GPA, Art. III.

<sup>52</sup> Case comment, *Weighting of Award Criteria after Tender Submitted Possible*, (2006), *EU Focus*, 179/180, p. 46.

the competition. Such bidding documentation usually includes the letter of invitation, tender notice, the specifications or description of the work required, the type of tendering procedure, a copy of the procurement regulations, layout of methods of payment, the length of the performance period, and terms and conditions of the contract. In practice, the bidding documents usually give tenderers a clear idea of the competition, enabling them to decide whether or not to participate in it. To this end, the contractor is responsible for carrying out the work in accordance with the contract documents.<sup>53</sup>

The preparation of bidding documents is a highly specialised task, which requires skill and precision, and is generally delegated to qualified and experienced procurement agents.<sup>54</sup>

Both the Purchasing Law and UK public procurement contract regulations require contracting authorities to prepare contract documents as a main step towards performance and competition of the contract. While the Purchasing Law requires the contracting authority to provide interested tenderers with full and consolidated documentation about the required work, UK public contract regulations oblige the contracting authority to send information about the contract within 6 days of receiving a request for it from any tenderer after publication of the tender notice.<sup>55</sup>

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<sup>53</sup> J. Murdoch and W. Hughes, *Construction Contracts: Law and Management*, (London, E&FN Spon Publisher, 2<sup>nd</sup> Ed., 1996), p. 141.

<sup>54</sup> P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, (West Yorkshire, Oxford University Press, 2004), p. 297.

<sup>55</sup> Purchasing Law, Art. 1(b), Works Regulations, Art.11(6), Supply Regulations, Art. 11(4), and Services Regulations, Art. 11(4).

## **D. Advertising Tender Opportunities**

Publication of tender opportunities is stipulated to ensure that anyone likely to be interested in participating in the tendering procedure comes to learn of the opportunity, of the time period for presenting tenders, the place to which to send tenders, and the conditions governing them through receipt of relevant specification. By observing the advertisement procedure, the contracting authority expands the circle of competition and choice, enabling it to select the tenderer that best fulfils the conditions of the tender in terms of value and quality of performance the work or provision of materials. Thus, the tendering process is not confined to one group of tenderers at the expense of others, and the contracting authority can not limit its contracts to a specific group of contractors using the excuse they were the only ones to come forward.

So that publication of tender opportunities achieves its aim to give interested tenderers sufficient time to prepare and present their tenders, Saudi procurement regulations require each contracting party, before advertising tenders, to prepare specification documents contracting the bid conditions and lists of goods or works.

The following sections discuss in turn the advertisement of tenders under Saudi Purchasing Law and UK Procurement Regulations.

### **1. Advertising tenders opportunities under the Purchasing Law**

Government competition is advertised to give those wishing to work with the contracting authority an opportunity to do so, and to enable the

contracting authority to obtain competitive tender prices. Conditions governing the manner of advertisement have been developed through the Purchasing Law and Royal Orders. According to Article 2(a) of the Purchasing Law, "Advertisement must be carried out about open tenders at the appropriate time in the *Official Gazette*, and be printed twice in the newspaper or two local newspapers".<sup>56</sup> The Royal Circular number 3/B/476 dated 12/01/1410 AH (1990) rules that the advertisement in general should be published both in the Official Gazette "*Um-AlQura*" and in at least two daily local newspapers.<sup>57</sup> Its publication in no more than two newspapers may suffice, provided "*Um-AlQura*" is included amongst the newspapers that print the advertisement. The first advertisement shall appear at least one month prior to the date fixed for the tendering process to begin.<sup>58</sup> This short period may create difficulties for foreign contractors, who are dealing with a different language, culture, and specifications. However, the Purchasing Law does not allow them an additional period to prepare their bids. Moreover, the advertisement period depends on the type of procurement work. A one month notification period usually related to a simple requirement contract. The advertisement period for complex high value and strategic projects differs, for example, if a food supply contract lasts for three years, the contracting authority must advertise its intention to re-contract within the first six months of the final year of the contract.<sup>59</sup> In order to give a new contractor plenty of time to prepare himself to carry out the work, Section II of chapter four,

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<sup>56</sup> Purchasing Law, *supra* n. 27, Art. 2(1).

<sup>57</sup> Royal Circular number 3/B/476 dated 12/01/1410 AH (1990) and Circular no. 451/M dated 23/2/1404 AH (1984)

<sup>58</sup> Implementing Regulations, *supra* n. 11, Art. 4.

<sup>59</sup> Royal Circular no. 15942 dated 12 / 10 / 1410 AH (1990).

described in detail the requirement to publish procurement opportunities and the penalty for failing to advertise such opportunities.

To ensure consistency in the wording of advertisements published in newspapers, a Circular issued by the Ministry of Finance, number 405/2036 dated 17/05/1405 AH(1985), detailed the specific wording to be used. Public agencies continue to follow the instructions of the Circular. In addition, after agreement with the Ministry of Information, newspapers now accept and publish advertisements under the title, 'Advertisements for government competitions'. Advertisements must include the following information:<sup>60</sup>

- 1- Number of the competition.
- 2- Name of the party advertising the procurement activity.
- 3- Price of competition documents.
- 4- Place where documents can be obtained.
- 5- Last date for presenting bids.
- 6- Place to which bids should be present.
- 7- Date of opening envelopes.
- 8- Classification required.
- 9- Comments.

Advertisements should be in usual font size, with the title in bold letters. As for what is printed in the Official Gazette, "*Um-AlQura*", the advertisement may be in any wording the Ministry thinks fit, even if it is very detailed.

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<sup>60</sup> Ministry of Finance Circular no. 405/2036 dated 17/05/1405 AH (1985).

An invitation to tenderers to present their tenders in the open tender procedure should include basic information about the time and place for presenting bids, the time of opening envelopes, and the time set for evaluating tenders.<sup>61</sup>

A period of at least thirty days should be set for the presentation of bids<sup>62</sup> calculated from the date of the first advertisement appearing in the *Official Gazette* about the procurement opportunity. In the case of selectively inviting tenderers, according to article 2(b) of the Purchasing Law, an invitation to present bids is made through recorded letters containing the same details as aforementioned in the case of open tenders. This notification method is more effective than advertisement in newspapers because potential tenderers' receipt of invitations to tender is recorded.

The period between the first advertisement appearing in "*Um-AlQura*" and the last date for accepting bids should be no less than a month.<sup>63</sup> If the estimated value of the contract exceeds fifty million Saudi Riyals, the period should be no less than two months.<sup>64</sup>

The contracting authority should also specify the time period between the last day for receiving tenders and the day for evaluating them in order to select a successful tenderer. This policy will avoid delay in selecting a successful tenderer.<sup>65</sup>

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<sup>61</sup> Purchasing Law, *supra* n. 27, Art. G(2) and (3).

<sup>62</sup> Implementing Regulations, *supra* n. 11, Art. 4.

<sup>63</sup> *Ibid*, Art. 4.

<sup>64</sup> Circular no. 247, dated 7/11/1403 AH (1983).

<sup>65</sup> Circular no. 17/1338 H, dated 5/05/1405 AH (1985).

It is argued that the contracting authority advertising the procurement opportunity should issue a translation of the documentation of conditions and specifications in order to encourage foreign tenderers to participate in procurement competition, even if the Purchasing Law does not expressly stated this. Finally, the procedure of publishing the tender opportunity by way of advertisement is recommended for use specifically for open tenders. However, this procedure alone should not be suitable for tenderers selectively chosen for tendering purposes. They should be contacted either by advertisement or recorded letters. The latter is preferred when the number of individuals or companies concerned is small.

Chapter four, section II, indicated that the Purchasing Law lacks reference to the use of modern technology, such as the Internet, to advertise procurement opportunities. This lack should be remedied since Saudi contracting authorities should be enable to benefit from modern technology.

## **2. Advertising tender opportunities under UK Procurement Regulations**

Advertising tender opportunities prevents the contracting authority from limiting its contracts to a specific set of contractors, and claiming they only came forward to offer bids. The regulations refer to three types of advertisement; the first, known as the Prior Information Notice (PIN), requires the contracting authority to publish its intended procurement activities in advance for the forth coming fiscal year.<sup>66</sup>

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<sup>66</sup> Works Regulations, Art.9, Supply Regulations, Art. 9, and Services Regulations, Art. 9.

The PIN procedure provides early notification of procurement activities since the contracting authority is required to publish its planned intention to procure well in advance in order to enable interested tenderers to carefully prepare their tenders to obtain the contract. It should be born in mind that the contracting authority is not under obligation to carry out all cited procurement activities.<sup>67</sup>

Under the second type of advertisement, contracting authorities are responsible for sending a notice to the *Official Journal* as soon as they decide the work needs to be carried out.<sup>68</sup>

The notice should include all information relating to the tendering competition such as the party to whom the tender should be presented, the last date for presenting tenders, the type of work required, the purchase price for tender documentation. The contracting authority must adhere to the information included in the published notification and evaluate all tenders according to this information. If it wishes to change some of the published information, it is under obligation to give tenderers sufficient time to prepare their tenders according to the new information.

The third type of advertisement is notification sent to the *Official Journal* of the award of a contract to a successful tenderer.<sup>69</sup>

Unlike Saudi Purchasing Law, UK regulations, as aforementioned in chapter four, section II, allow the contracting authority flexibility in the manner in which advertises tendering opportunities, for example, by telex,

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<sup>67</sup> C. Bovis, 'Public Procurement in the European Union', (West Yorkshire; Palgrave Macmillan; 2005.), p. 51.

<sup>68</sup> Works Regulations, Art.12(2), Supply Regulations, Art. 12(2), and Services Regulations, Art. 12(2).

<sup>69</sup> Works Regulations, Art.21, Supply Regulations, Art.22, and Services Regulations, Art. 22.



telegram or telefax in the case of accelerated procedures.<sup>70</sup> Moreover, as well as to publishing the notice in the *Official Journal*, the new EC Public Sector Directive allows the contracting authority to publish such notice on its Internet website and the authority is obliged to send an electronic copy in a form specified by the regulations.<sup>71</sup>

Further, unlike Saudi Purchasing Law, the new EC Public Sector Directive takes the size of the public contract into account and the contracting authority is accordingly requested to 'take account of the complexities of the contract and the time required for drawing up tenders',<sup>72</sup> before setting the time within which tenders may be received.

Under the third type, once the contracting authority has made a decision on the tenders it has received, it must inform the successful tenderer that he has won the contract and unsuccessful tenderers must be informed of the reasons why they have not been awarded the contract. The contracting authority is also required to inform the *Official Journal* of the award decision within 48 days.<sup>73</sup> Its publication will give other tenderers the opportunity to challenge the award decision and to rectify any limitations that might have prevented them from obtaining the contract. The regulations allow the contracting authority 15 days within which to 'inform an unsuccessful tenderer the reasons why he was unsuccessful'.<sup>74</sup> The regulations stipulate that an unsuccessful tenderer may request from the contracting authority the reasons for his failure to win the contract in writing.

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<sup>70</sup> Works Regulations, Art.12(2), Supply Regulations, Art.12(2), and Services Regulations, Art. 12(2).

<sup>71</sup> EC Public Sector Directive, Art. 35(1)(3).

<sup>72</sup> *Ibid.*, Art. 38(1).

<sup>73</sup> Works Regulations, Art.21(1), Supply Regulations, Art.22(1), and Services Regulations, Art.22(1).

<sup>74</sup> Works Regulations, Art.22(1), Supply Regulations, Art.23(1), and Services Regulations, Art.23(1).

Finally, it should be mentioned that in addition to publishing procurement opportunities in the *Official Journal*, contracting authorities may use two other channels for such publication. They may advertise their procurement intention in their domestic press, provided it has been previously published in the *Official Journal*, and in an electronic data bank known as Tenders' Electronic Daily database (TED).<sup>75</sup>

### **E. Obtaining tenders**

In general, obtaining government contracts is done in most procurement regulations through a system of competitive tendering. Tender procedures are based on three elements to establish the final contract between the contracting authority and private contractor: tender documentation, tender bids, and selection of the successful tender bid preceding the preparatory decision to award the contract.<sup>76</sup>

The objective of competitive tendering is to enable as many potential tenderers as possible to take part in the procurement process. All interested qualified tenderers shall be given, as mentioned in chapter three, an equal opportunity to participate in the procurement competition. Therefore, the contracting authority is obliged to advertise its intention to offer the work in national official journals such as the Saudi *Official Gazette* and EC *Official Journal*. Transparency is a very important principle since all interested tenderers are given equal information regarding the procurement contract.

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<sup>75</sup> Works Regulations, Art. 12(2); Supply Regulations, Art. 12(2), and Services Regulations, Art. 12(2).

<sup>76</sup> K. Kruger, "The Scope of Post-Tender Negotiations in International Tendering Procedures", in S. Arrowsmith & A. Davies (eds.), *Public Procurement Global Revolution* (London, Kluwer Law International, 1998), Ch. 10, p.181.

Most procurement regulations adopt similar rules. They allow open, selective and limited tendering procedures. The following sub-sections describe tendering procedures under Saudi Purchasing Law and UK procurement Regulations.

### **1. Obtaining tenders under Saudi Purchasing Law**

The Purchasing Law provides for three types of tendering procedures

- a. Open.
- b. Selective.
- c. Direct Purchase.

Another can be added to these, namely, the sole tender. Each will be discussed separately below.

#### **a. Open Tendering Procedure**

The use of open tendering procedures allows genuine competition between tenderers.<sup>77</sup> The adoption of open tendering procedures will not only increase competition between tenderers, but also encourages tenderers to prepare competitively priced tenders. The open tendering procedure relies on simple criteria, such as price, for determining who will be awarded the contract. Open tendering procedures are often utilised when the procurement process is relatively straightforward and lowest price is the award criterion.<sup>78</sup>

It is worth mentioning that the Purchasing Law does not specify when the contracting authority should use the open or another tendering procedure. It contains general provisions allowing the contracting authority to

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<sup>77</sup> S. Al-Tamaui, *supra* n. 22, p. 216.

<sup>78</sup> C. Bovis, "EC Public Procurement Law", Longman, 1997, p.65.

use either procedure. Nevertheless, it insists that the open tendering procedure is the primary one,<sup>79</sup> since all contracting authorities are required to use it as much as they can. At the same time, it does not contain any guidelines or manuals to inform them when they must use the open procedure. Article 3 refers to inviting five or three contractors to carry out the work. Accordingly, in practice, most contracting authorities use the selective procedure as the primary tendering procedure. This has led to complaints from some contractors.<sup>80</sup> Consequently, in 1983, the Cabinet Office, "*Al-Dewan Al-Malaki*", issued a Royal Circular to all public agencies requesting them to use the open procedure as the main tendering procedure. The Royal Circular states, "All interested contractors must be given full and fair opportunity to participate in procurement contracts. The contracting authority is required to publicise its projects in an open procedure and give contractors sufficient time to submit their tenders".<sup>81</sup> At first glance, this circular appears to repeat the same mistake as the Purchasing Law in that it does not indicate when the contracting authority should use the open procedure. However, referring to the practice of public agencies, Article 3 of the Purchasing Law mentions projects and works, such as construction, office equipment, operation and maintenance, supplying food, and drilling wells<sup>82</sup> for which the contracting authority should use the open procedure to invite tenderers to perform them. If the value of such projects and works exceeds one million Saudi Riyals, then the contracting authority, in general, should use the open

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<sup>79</sup> Circular no. 3/W / 23401 dated 18 / 10 / 1401 AH (1981).

<sup>80</sup> Circular no. 3/ H / 2601 dated 10 / 2 / 1401 AH (1981).

<sup>81</sup> Royal Circular no. 9751 dated 26 / 4 / 1403 AH (1983).

<sup>82</sup> Purchasing Law, *supra* n. 27, Art.3 (a,b,c,d,e,f,h).

procedure.<sup>83</sup> However, if the value of these projects is less than one million, the contracting authority, as explained later, has the right to use either an open, selective or direct purchase procedure.

**b. Selective Tendering Procedure**

Under the selective tendering procedure, only those contractors invited to carry out the work or supply goods by the contracting authority may submit their tenders,<sup>84</sup> especially if the work or goods are protected by patent.<sup>85</sup>

The contracting authority may select such tenderers:

1. From the approved list or, in the absence of such a list, on the basis of their experience; or
2. Request all selected tenderers to submit their tenders and then select the contractor.

Although Article 3 of the Purchasing Law allows the contracting authority to use the selective procedure, the contracting authority must justify its decision to use this procedure. There are two preconditions for the contracting authority to use the selective procedure:

- a. It has decided it is unnecessary to use the open procedure because only a limited number of tenderers are specialised in the work needed;
- or

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<sup>83</sup> A. Al-Wahaibi, *supra* n. 26, p. 99.

<sup>84</sup> F. Moauad, *"Saudi Government Procedure Policies"*, Institution of Public Administration Publication, 1987, p.81.

<sup>85</sup> For instance, supplying medicines to the pharmacies of the Health Ministry. In the case of Panadol, the Ministry is required to contact the factory which owns the patent for such medicine or its local agent responsible for procurement opportunities.

- b. If the purpose or the nature of the contract requests that it contracts with a specific contractor.

One commentator<sup>86</sup> asserts that the contracting authority is prevented from using the selective procedure by issuance of Royal Circular no 9471<sup>87</sup> which requires them to refrain from using it. However, one can dispute this assertion for three reasons.

- (i) A Royal Circular does not repeal a Royal Order as the former is lower in the legal hierarchy than the latter. According to the legal hierarchy principle,<sup>88</sup> the legal effect of a lower legal instrument does not exceed that of a higher instrument, and the higher takes precedence over all principles or rulings issued through a legal instrument lower than it. A Royal Order is issued by the King as the Chairman of Council of Ministers, therefore, supersedes all other legal laws, regulations, and circulars. Based on the hierarchy principle, a Royal Order can repeal or amend any law or regulation that contradicts it. Consequently, the Royal Circular does not affect the power of a legal principle that results from the Royal Order, in this case, the Purchasing Law. As a result, the ruling of the Royal Circular is regarded as a guideline that should not contradict the rulings that result from the Purchasing Law. Hence, one may conclude

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<sup>86</sup> A. Al-Wahaibi, *supra* n. 26, p.108.

<sup>87</sup> Royal Circular no.9471 dated 26/4/1403 AH (1983).

<sup>88</sup> A. Khalil, “*Saudi Administrative Law*”, (Jeddah, Musbah Publisher, 1<sup>st</sup> Ed., 1990), p. 115.

that the ruling included in this Royal Circular has no legal influence on the provisions of the Purchasing Law, even if it was issued after this law.

- (ii) The Royal Circular provides instructions for the contracting authority to follow or, in other words, guidelines to implement of Article 3 of the Purchasing Law.
- (iii) The selective procedure is very important and contracting authorities should not abandon it. The specialist nature of some contracts demands that the contracting authority rely on this procedure.

Notwithstanding the importance of the selective procedure, the contracting authority must use the open procedure as the primary tendering procedure and allow all interested tenderers to participate in procurement projects.

#### **c. Direct Purchasing Procedure**

Direct purchasing means to purchase directly without competitive bidding. The contracting authority contracts directly without inviting competing tenders on either an open or selective basis.<sup>89</sup> In this type of tendering procedure, there is no need for a written contract because the price is less than one million Saudi Riyal (£60,000).<sup>90</sup> The procedure is intended to help the contracting authority obtain simple requirements, such as office equipment, or to fix small technical problems, such as plumbing problems, in a very short time.

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<sup>89</sup> A. Al-Wahaibi, *supra* n. 26, p.109.

<sup>90</sup> Purchasing Law, Art. 3(c).

The contracting authority may use the direct purchasing orally, i.e. buy requisites directly without a written contract. The contracting authority simply receives a bill for the goods it purchased and pays it.<sup>91</sup>

There are many reasons for using this type of tendering procedure. Some of them relate to the purpose of the contract, while others relate to the nature of the contract. The contracting authority may use direct purchasing to purchase its needs from small or medium size enterprises to protect them from large national or international competitors and help them stay in the procurement market. Therefore, the Purchasing Law calls public agencies to procure by direct purchasing procedure if the value of the contract does not exceed one million Saudi Riyals.<sup>92</sup> This provision helps small or medium size enterprises to participate and to stay in the procurement market.

One reason for using direct purchase is urgency. Procurement can be carried out by direct purchasing if it is difficult or impossible to procure goods or works by open or selective procedures. Interestingly, most contracting authorities use the direct purchasing procedure as a matter of course.<sup>93</sup>

It should be noted, however, that if the contracting authority decides to cancel the process because the tender price is not suitable according to Article 5(e), it must not use direct purchasing after the cancellation but thereafter employ open or selective procedures.<sup>94</sup>

It should be noted that although the contracting authority has the right to select contractors using the direct purchasing procedure, and therefore has

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<sup>91</sup> F. Moauad, *supra* n. 86, p.128.

<sup>92</sup> Purchasing Law, *supra* n. 27, Art. (3)(h).

<sup>93</sup> A. Al-Wahaibi, *supra* n. 26, p.110.

<sup>94</sup> K. Al-Jumah, Arab State Contract Disputes: Lessons from the Past, *Arab Law Quarterly*, Vol. 6, Pt 1, 2002, p. 228.



no need to advertise or invite several tenderers to participate in the procurement process, it must not use such procedure in order to avoid employing other tendering procedures. In other words, the contracting authority is not allowed to use the direct purchasing procedure in order to contract directly with a particular contractor and prevent other contractors from participating in the procurement competition.<sup>95</sup>

In addition, the contracting authority is not allowed to avoid employing open or selective tendering procedures by dividing the procurement project into two or several projects so as to make the price of each project comply with the direct purchasing threshold.<sup>96</sup>

Also, the contracting authority may use direct purchasing to purchase a particular machine in order to test its effectiveness for lab research. Should the machine prove effective, the authority may invite tenderers to supply this type of machine using open or selective tendering procedures.

Finally, in some contracts the contracting authority might instruct the contractor to carry out additional work, or change the specifications, and thus may lead to the contractor's failure to complete the contract on the agreed time. In this case, the contracting authority may use direct purchasing procedure to extend the existing contractor to perform the additional work. Five conditions must be met before the contracting authority can extend the contract without signing a new contract or inviting a new tendering process:

1. The additional work was not expected at the time the contracting authority

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<sup>95</sup> A. Zohny, Egypt's Procurement Regime and Building an Export Oriented Economy, *Arab Law Quarterly*, Vol. 4, Pt 1, 2003, p. 179.

<sup>96</sup> N. Turck, Dispute Resolution in Saudi Arabia, *Arab Law Quarterly*, vol. 6, pt. 1, 1991, p. 11.

singed the contract; 2. the additional work cannot for technical or economic reasons be carried out separately from the works carried out under the original contract without great inconvenience to the contracting authority; 3. The additional work can be carried out separately from the work carried out under the original contract and is necessary to complete the later stage of that contract; 4. The additional work does not exceed 50% of the contract's value, 5. The original contract includes a provision allowing the contracting authority to use the direct purchasing tendering procedure to add new quantities or variation.

**d. The Sole Tender**

In the case of tenders failing to respond to an open or selective procedure the contracting authority may accept a sole tender. The sole tender must satisfy the conditions and specifications of the contract.<sup>97</sup>

The Purchasing Law stipulates that the sole tender must be approved by the head of the contracting authority concerned and only accepted if the nature of the work precludes inviting another tender.<sup>98</sup> According to Article 19, the contracting authority is under an obligation to cancel the tendering process if it is difficult to make a comparison between several prices because only one tender is received. Moreover, the core of the tendering process is the competition between tenderers, which is not obtained in the case of a sole tender. For these reasons, the Purchasing Law deems the sole tender an exceptional tender and gives the Minister or the president of the public

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<sup>97</sup> Finance Ministry Letter no.17/2561 dated 22/8/1404 AH (1984).

<sup>98</sup> Implementing Regulations, *supra* n. 11, Art.19.

agency the right to accept or reject it. Despite this right, one may ask whether a Minister can approve a sole tender over his Ministry's financial limit. Neither the Purchasing Law, nor the Implementing Regulations address this issue. In light of this deficiency, it is useful to examine the actual practice of some public agencies. In practice, the Minister has the right to approve use of a sole tender in circumstances of urgency, even if the price of the contract exceeds his financial limit. However, the price of the sole tender must be reasonable.<sup>99</sup> If the price is high, the Examination Committee may negotiate with the tenderer to reduce his tender price.

It is worth mentioning that the Purchasing Law identifies only one type of sole tender. In the author's view, another type of sole tender should be recognised by the Purchasing Law. In the case where the contracting authority receives several tenders but has to exclude all with the exception of one during the evaluation process either because their prices are too high, they do not meet the specified conditions, or tenderers are not qualified to perform the work, the one tender expected should be the sole tender and the contracting authority is required to either reject it and request new tenders or to accept it. If the latter, the Evaluation Committee's decision to accept it as the sole tender is not final. The head of the public authority must approve the Evaluation Committee's decision otherwise it will be deemed null and void.

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<sup>99</sup> A. Al-Wahaibi, *supra* n. 26, p.170. The sole tenderer must not take advantage of not having competitors and increase the price of the tender. The law-makers anticipated this might happen and so set the condition that the price of the tender should be reasonable, i.e. the price of the sole tender should be similar or vary little from the market price. For this reason, the head of the contracting authority is given the authority to confirm the sole tender.

## **B. Obtaining tenders under tendering Procedures under UK Regulations**

UK procurement regulations permit four types of tendering procedures: open, restricted, negotiated and competitive dialogue procedures.

### **a. Open Tendering Procedure**

The open tendering procedure ensures that the contracting authority is able to select most competitive tender. This type of tendering procedure opens the gate wide to interested tenderers in participating in the procurement market. It obliges the contracting authority to give all interested tenderers the opportunity to submit their tender to carry out the work. Under restricted tendering procedure, discussed in the next section, the regulations require the contracting authority to invite a certain number of tenderers, between five and twenty, which suggests the authority may invite more than twenty tenders to participate in the open tendering procedure. Open procedures are utilised mostly when the procurement process is relatively straightforward and lowest price is the award criterion. In contrast, restricted and negotiated procedures are utilised when 'most economically advantageous' is the award criterion, and such procedure suited for complex procurement schemes.<sup>100</sup>

Similar to Saudi Purchasing Law, UK procurement regulations do not clarify when the contracting authority should use open or restricted procedures, they leave this decision to the discretion of the contracting authority, which must therefore, justify its decision to choose open or

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<sup>100</sup> C. Bovis, *supra* n. 69, p. 60.

restricted procedures.<sup>101</sup> However, the UK regulations require the contracting authority to state in the published contract notice, or in the invitation to tender, the type of tendering procedure employed and the contracting documentation necessary to carry out the work.<sup>102</sup>

The regulations require the contracting authority to allow sufficient time between the publication of the tender notice and the date of receiving tenders in order to give tenderer sufficient time to prepare their tenders. They distinguish between works with simple requirements and bulky projects. For the former, notice is 52 days<sup>103</sup> within which to submit tenders, while in the latter case, the period is extended to allow for document preparation and inspection of the site.<sup>104</sup> The regulations do not, however, define the extension period, but leave the contracting authority free to choose any period. The time limit should include sufficient time to allow EC contractors as well as UK contractors to prepare and inspect the site before the final date for receipt of tenders.

After advertising the invitation to tender, the contracting authority is required to send contract documentation <sup>105</sup> within six days of any tenderer

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<sup>101</sup> Works Contract Regulations, Art. 22(2)(c), Supply Regulations, Art 23(2)(c), and Services Regulations, Art. 23(2)(c).

<sup>102</sup> Works Regulations, Art. 11(2), Supply Regulations, Art 11(2), and Services Regulations, Art. 11(2).

<sup>103</sup> Works Regulations, Art. 11(3), Supply Regulations, Art 11(3), and Services Regulations, Art. 11(3).

<sup>104</sup> Works Regulations, Art. 11(3), Supply Regulations, Art 11(3), and Services Regulations, Art. 11(3).

<sup>105</sup> The definition of contract documents refers here to the conditions of the contract, the specifications or description of the work and all supplementary documents. See Works Regulations, Art. 2 (1), Supply Regulations, Art. 2 (1), and Services Regulations, Art. 2 (1).

requesting this.<sup>106</sup> If the six days period includes a non-working day,<sup>107</sup> then the number of days must be extended to include the next working day.<sup>108</sup>

The contracting authority has the right to exclude a tenderer from the evaluation of tenders in two cases<sup>109</sup>:

1. If the tenderers is viewed as ineligible,<sup>110</sup> and
2. If the tenderers fails to satisfy the minimum economic or financial standing requirements, or technical capacity, which will be discussed in chapter six, section A.

In addition to the criteria for rejecting contractors specified in Articles 14, 15, 16 and 17 of the Works, Supply and Services Regulations, in one case the High Court supported the refusal of a tender because the tenderer had not previously completed a road work project to a value similar to the tender price. The court held that since the prequalification criterion applied to all potential contractors, the refusal was not, therefore, discriminatory. It was objective and was related to financial and technical conditions.<sup>111</sup>

In another case,<sup>112</sup> the contracting authority excluded a tender from the evaluation of offers because the contractor failed to meet "council requirements on health and safety grounds". It held that the company's technical capacity, which extended to the contractor's ability to perform the

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<sup>106</sup> Works Regulations, Art.11(5), Supply Regulations, Art 11(4), and Services Regulations, Art.11(5)

<sup>107</sup> Works Regulations, Art.2(3)(a), Supply Regulations, Art 2(3)(a), and Services Regulations, Art. 2(3)(a).

<sup>108</sup> S. Arrowsmith, *supra* n. 28, footnote no. 70, p. 203.

<sup>109</sup> Works Regulations, Art.11(7), Supply Regulations, Art11(7), and Services Regulations, Art.11(8)

<sup>110</sup> Article 14(1) of the regulations provides some situations as guidance for contracting authorities to follow to treat a tenderer or contractors as ineligible, such as has not paid his taxes, has been bankrupt, has been convicted of a criminal offence relating to the conduct of his business.

<sup>111</sup> *Minter v. Welsh Health Technical Service Organisation* (1981) 13 B.L.R. 1.

<sup>112</sup> *Bickerton v. N.W. Metropolitan Hospital Board* [1977] 1 ALL E.R. 977, 989.

contract with due regard for health and safety requirements, was a relevant consideration.

**b. Restricted Tendering Procedure**

The restricted procedure is the same as the open procedure, except the contracting authority limits the number of tenderers engaging in the tendering process. The contracting authority accepts tenders by invitation only.<sup>113</sup> In order to ensure that only technically and financially qualified tenderers carry out the work, the contracting authority may send invitations in writing<sup>114</sup> to those who are registered on the official list of recognised contractors<sup>115</sup>. Grounds for justifying use of the restricted procedure include the need to maintain a balance between contract value and procedural costs, or the specific nature of the product to be procured.<sup>116</sup>

Genuine competition between tenderers is an essential element in the restricted procedure. The contracting authority must invite between five and twenty<sup>117</sup> tenderers to facilitate genuine competition, and is also under an obligation to ensure there is no discrimination between potential contractors on the grounds of nationality or place of establishment.<sup>118</sup>

Article 12 does not contain specific criteria for selecting contractors. Instead, it requires the contracting authority to make the selection in accordance with Articles 14, 15, 16 and 17 of the Works, Supply and Services

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<sup>113</sup> Works Regulations, Art.12/5, Supply Regulations, Art 12/5, and Services Regulations, Art.12/5.

<sup>114</sup> Works Regulations, Art.12(9), Supply Regulations, Art 12(9), and Services Regulations, Art. 12(9).

<sup>115</sup> Works Regulations, Art.18, Supply Regulations, Art19, and Services Regulations, Art.18.

<sup>116</sup> J. Winter, "Public Procurement in the EC", *Common Market Law Review*, vol.28, 1998, p.765.

<sup>117</sup> Works Regulations, Art.12(6), Supply Regulations, Art 12(6), and Services Regulations, Art. 12(6).

<sup>118</sup> Works Regulations, Art.12(5), Supply Regulations, Art 12(5), and Services Regulations, Art. 12(5).

Regulations. However, the selection criteria mentioned in these regulations are not exclusive to restricted procedures, they apply also to open and negotiation procedures. Such criteria focus on the ability of contractors to perform the contract, their technical capacity and financial ability.<sup>119</sup> Contractors are under an obligation to provide some information about their financial standing, such as a statement from their bank which proves their financial capacity to carry out the work.<sup>120</sup> In this regard, the European Court of Justice decided in case *C-360/89, Commission v. Italy*<sup>121</sup> that the authority is required to make its choice on economic and financial grounds or on one of the Article 14 criteria. It held that "in restricted procedures, authorities awarding contracts must select the candidates they are to invite to tender on the information relating to the personal position of the contractor and the minimum economic and technical standards which the authorities awarding contracts require of contractors for their selection." The High court in *Bickerton v. N.W. Metropolitan Hospital Board* ruled that it is permissible to take into account the tenderer's health and safety record, only if such requirement affects the tenderer's technical capacity.

Restricting the contracting authority's selection of contractors to technical and financial capacity, as suggested by the ECJ, will not help the authority to obtain the best offer. It has been suggested<sup>122</sup> that the procuring agency may be prevented from selecting the firm likely to make the best offer

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<sup>119</sup> These are some of the objective factors which will be presented in detail in Ch. 6, section A.

<sup>120</sup> Works Regulations, Art. 15(1), Supply Regulations, Art 15(1), and Services Regulations, Art. 15(1).

<sup>121</sup> *C-360/89, Commission v. Italy* [E.C.R] I-3401, paras. 17 and 18 at 3419.

<sup>122</sup> S. Arrowsmith, "Future Prospects for the European Community's Regime on Public Procurement", in L. Gormlet, (ed.), *Gordian Knots in European Public Procurement Law*, (Trier: ERA, 1997), p. 83, at 93.



in view of the sharp distinction drawn in the European directives and the court's judgements between qualification and award criteria. Even selecting those with the best financial and technical ratings would seem problematic, if all the other candidates have qualifications which easily exceed what is required for the contract.

As aforementioned in relation to open procedures, from the date of sending invitations to them, the contracting authority should allow selected contractors not less than 40 days to prepare and submit their tenders.<sup>123</sup> However, in a case of urgency, the authority may reduce the period between advertising the tendering opportunity and receiving tenders to a period of not less than 10 days.<sup>124</sup>

### **c. Negotiated Tendering Procedure**

Negotiated tendering procedure is the negotiation of the terms of the contract with one or more persons selected by the contracting authority.

In general, the contracting authority uses the negotiated procedure in very limited circumstances.<sup>125</sup> It is an alternative to open and restricted procedures, and offers a way to find a suitable contractor after other methods

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<sup>123</sup> Works Regulations, Art.12(11), Supply Regulations, Art 12(11), and Services Regulations, Art. 12(11).

<sup>124</sup> Works Regulations, Art.12(14), Supply Regulations, Art 12(14), and Services Regulations, Art. 12(14).

<sup>125</sup> The Private Finance Panel has recommended that the negotiated procedure be adopted for all PFI projects. The Private Finance Initiative (PFI) was introduced by the Conservative Government in 1992. The objectives underlying the PFI are to deliver modern and effective public services and to bring private sector finance, ownership, and management into the provision of public services. See D. Kerr, "The Private Finance Initiative and the Changing Government of the Built Environment", *Urban Studies*, Vol. 35, No 12, p.2278, and The Management of Procurement under the Private Finance Initiative: Building for the Future, Report Published by the Audit Commission for Local Authorities and National Health Services in England and Wales, June 2001, p.9. A successful bidder would be awarded a concession of, commonly, 20 to 30 years and be responsible for raising finance and designing, constructing, commissioning and operating the project facility. Due to the high tender cost and complexity of most PFI projects, this is the only practicable procedure to follow. In order to use the negotiated procedure, the proposed contract must fall within defined criteria, included in section 10(20)(c) of the regulations. See J. Bellhouse, "New Approaches to Highway Procurement", 1999, *Construction Law Journal*, pp. 117-119.

have failed to find one to carry out the work. The contracting authority may use this procedure in the situations cited below. The burden of proof for justifying use of the negotiated procedure rests on the contracting authority:

1. In cases where responses to open or selective tenders have not been received.<sup>126</sup>
2. Where the invitees do not satisfy the minimum standards of economic and financial standing.<sup>127</sup>
3. Where the nature of the contract forces the authority to exclude open or restricted procedures.
4. Where there are exclusive rights surrounding particular goods and the authority cannot find an alternative competitor.
5. In extreme urgency.<sup>128</sup> However, the ECJ has ruled that this exception is applicable only under three conditions:
  - a) the existence of an unforeseen event,
  - b) an extreme urgency incompatible with time limits laid down in the other procedures, and
  - c) a causal connection between the unforeseen event and the extreme urgency that is a result of the former.<sup>129</sup>
6. For certain additional or repeat contracts.<sup>130</sup> The Contracting authority has the right to negotiate with the contractor to carry out

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<sup>126</sup> Works Regulations, Art.10(2)(d), Supply Regulations, Art 10(2)(d), and Services Regulations, Art. 10(2)(d).

<sup>127</sup> Works Regulations, Art.13(7), Supply Regulations, Art 13( 7), and Services Regulations, Art. 13( 7).

<sup>128</sup> Works Regulations, Art.13( 4), Supply Regulations, Art 13( 4), and Services Regulations, Art. 13(4).

<sup>129</sup> C- 107/92, Commission v. Italy, para. 12.

<sup>130</sup> A. Brown & C. Pounecy, "Expanding the International Market for Public Procurement: the WTO's Agreement on Government Procurement", *International Trade Law & Regulation*, 1995, p.74.

additional works. However, such additional works must not have been anticipated when the authority signed the original contract. Also, such works must be ones that cannot be carried out separately from the original contract, or that can be carried out separately but are strictly necessary to the later stage of the original contract.<sup>131</sup>

Depending on the case, the contracting authority can use this procedure with or without prior publication of a tender notice. The regulations recognise that in a limited number of circumstances it may be necessary for procuring agencies to turn to a sole supplier for fulfilment of a certain requirement.<sup>132</sup> No modern public contract regime can do without negotiated procedures, at least as a limited exception to the main rule on the use of open or restricted tender procedures.<sup>133</sup>

In conducting negotiated procedures, the contracting authority can negotiate directly with selected invitees or, alternatively, use negotiated procedures with prior advertisement of the tender notice.

**i. Negotiated procedures without prior advertisement of the tender notice**

**Preamble**

The nature of some works has necessitated the law-makers restricting some important principles in procurement, for example, transparency. The

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<sup>131</sup> Works Regulations, Art.10(2)(g), Supply Regulations, Art 10(2)(g), and Services Regulations, Art. 10(2)(g).

<sup>132</sup> A. Reich, *supra* n. 51, p. 120.

<sup>133</sup> K. Kuger, *supra* n. 78, p. 187.

contracting authority has accordingly been allowed to start contracting directly without declaring its intention to enter into a contract in the *Official Journal*, because the contractor selected might otherwise impose the price that he wishes upon the administrative party, which may create an additional burden on the general budget. Moreover, as a result of not advertising and in the absence of competition, maintenance costs might be increased because a specific contractor has exclusive rights on the project that is the subject of the contract.

The regulations cite seven situations in which the negotiated procedure may be used without prior notice:

- (i) Article 10(2)(b) of the regulations sets out the types of works do not need to be advertised, for example, research activities conducted by a higher education institution.<sup>134</sup> Such a contract may be signed directly by a contracting authority without advertisement.
- (ii) Development is also permitted to be undertaken without prior notice. The regulations do not define the meaning of development, but the supply regulations refer to "...the goods to be manufactured purely for ... development".<sup>135</sup> This narrows the wide meaning of development to a manufacturing context. The contracting authority is allowed to contract for the development of some goods without prior notification. The

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<sup>134</sup> Works Regulations, Art.10(2)(b), Supply Regulations, Art 10(2)(c), and Services Regulations, Art. 10(2)(c).

<sup>135</sup> Supply Regulations, Art 10(2)(c).

intention is to make it easier to contract with a particular contractor, such as a research institution, which specialises in a particular type of goods, to develop it. Regular tendering procedures, open and restricted, will not help the contracting authority select a particular research institution to provide a particular type of goods because open or restricted procedures invite several tenderers to compete which forces the contracting authority to contract with one of them even if the one selected is not a specified in developing the type of goods the contracting authority wants to develop. Consequently, the contracting authority may contract directly with a particular firm or institution known to provide the product required.

- (iii) In the absence of tenders, and where the contracting authority fails to find a suitable contractor under open or limited procedures,<sup>136</sup> it is permissible for the authority to contract directly without prior publication. In this case, the law-makers had two options: to require the contracting authority to go through the tendering procedure for a second time and ask all contractors to resubmit their bids, or to contract directly under negotiated procedure. The law-makers chose the easier option and allow the authority to contract directly without prior notification.

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<sup>136</sup> Works Regulations, Art.10(2)(d), Supply Regulations, Art 10(2)(d), and Services Regulations, Art. 10(2)(d).

(iv) When the contract can only be carried out by a particular contractor because of a technical or artistic reason, or to protect patent rights.<sup>137</sup> Such reasons for using negotiated procedure need to be fully justified and supported by technical evidence, since they are clearly open to abuse.<sup>138</sup> In one instance, the ECJ found that Italy breached its obligations by allowing a particular contractor to conclude a contract for the construction of a section of a rapid transit highway without publishing a notice of invitation to tender in the *Official Journal*. It held that the technical reasons which the Italian government relied on can only be invoked where the work is additional to existing work and can only be done by the existing contractor.<sup>139</sup>

(v) To protect exclusive rights:

The authority is allowed to contract without prior publication if only one firm or contractor owns the right to perform the work. In the case of intellectual property, where only one legal person or entity owns a trade name, trade mark, patent, copyright or trade secret, or has the exclusive right to carry out the work, the exclusive right protection restricts the authority from declaring a procurement competition, because only one or very few firms own such right. It is obvious that the contracting authority is under an obligation to apply, as far as it can, the

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<sup>137</sup> Works Regulations, Art.10(2)(e), Supply Regulations, Art 10(2)(d), and Services Regulations, Art. 10(2)(d).

<sup>138</sup> P. Trepte, "Public Procurement in the EC", [CCH Edition Ltd. Oxfordshire, 1993], p.123.

<sup>139</sup> C-296/92, *Commission v. Italy*, Judgement of January 12, 1994 [1994] I-I opinion of Mr. Advocate General Gulmann, paras. 1,6,12, and 14.

principle of competition among all interested contractors and to give them equal treatment. Therefore, it must try to draw its specifications in general terms and, as far as possible, not attempt to benefit a particular contractor because he owns an intellectual property right for a particular work. Thus, the contracting authority is required, as much as it can, to avoid drawing specifications protected by intellectual property rights. In this regard, the ECJ stressed that contracting with a particular contractor must be "absolutely essential" and the burden of proving the actual existence of exceptional circumstances to justify a derogation rests on the person seeking to rely on those circumstances.<sup>140</sup>

(vi) Additional works with an existing contract:

In some exceptional cases, the authority needs to contract with an existing contractor for additional work. The regulations take into account this matter and allow the authority to contract directly without publishing a prior notice in the *Official Journal*. However, as a general principle, it is not permitted for the contracting authority simply to negotiate a new agreement with an existing partner,<sup>141</sup> unless the additional works or supplies might cause disproportionate technical or operational difficulties if performed by a separate contractor. The regulations stipulated two conditions in order for the contract to perform additional

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<sup>140</sup> C-57/94, *Commission v. Italy*, [1994] I-1249, Paras. 23-24.

<sup>141</sup> S. Arrowsmith, *supra* 28. 56, p. 262.

work. First, the additional work cannot be carried out separately, i.e. if the separation between the original work initially agreed to be performed and the new additional work might cause technical difficulties and affect the quality of the work. Second, it is "strictly necessary" that additional works to be carried out by the original contractor.<sup>142</sup>

The contracting authority has the right to decide the extent of such necessity and when it should re-contract with the existing contractor. However, the additional works or services must not exceed 50 per cent of the value of the original contract.<sup>143</sup> In addition, the contracting authority is permitted to use negotiated procedures without prior notification for new works or services consisting of the repetition of similar works entrusted to the same undertaking to which the contracting authority awarded an earlier contract.<sup>144</sup> The article stipulates that the contract notice of the original contractor must state that works or services for repeated work are to be carried out by negotiated procedure with the same contractor.<sup>145</sup>

Despite strict limitations on the cases of contract without previous advertisement, there still remain legal loopholes due to uncertainty on some points. For example, what constitutes "extreme urgency", and is the

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<sup>142</sup> Works Regulations, Art.10(2)(g)(ii), Supply Regulations, Art 10(2)(f)(i), and Services Regulations, Art. 10(2)(f)(i).

<sup>143</sup> Works Regulations, Art.10(4), Supply Regulations, Art 10(4), and Services Regulations, Art. 10(4).

<sup>144</sup> P. Trepte, *supra* n. 140, p. 128.

<sup>145</sup> Works Regulations, Art. 10(5), Services Regulations, Art. 10(5).



estimation of such urgency at the discretion of the contracting authority, or is the involvement of other parties necessary to define it? Similarly, what is meant by the word “development” used in article 10(2)(C)? Does it mean the development that occurs through scientific research, or the development of factories? Further, could this word have a wider meaning to include disadvantaged regions? Thus, the word ‘development’ needs to be defined more accurately so that it is not abused.

**ii. Negotiated procedures with prior advertisement of the tender notice**

If the contracting authority fails to find a suitable contractor under open or restricted procedures, it is allowed to advertise its intention to use negotiated procedures under the limited or specific circumstances, cited below:

- (i) If it fails to find a contractor through open or restricted procedures, the contracting authority has three ways to carry out works or services. First, it may, as mentioned above, use the negotiated procedure without prior advertisement. Second, the authority may decide that the nature of the work or necessity makes it preferable to use the negotiated procedure with advertisement. In this case, the authority is required to state in the tender notice that it will use the negotiated procedure.<sup>146</sup> Third, it may cancel the tendering process and establish it again through open or restricted procedures.

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<sup>146</sup> Works Regulations, Art.10(2)(a) and 13(1), Supply Regulations, Art. 10/2/a and 13(1), and Services Regulations, Art. 10(2)(a) and 13(1).

- (ii) When seeking offers for research and development:

Article 10(2)(b) of the Works, Supply and Services Regulations contains two approaches for seeking offers for research and development through negotiated procedures. It allows the contracting authority to seek offers for research and development either with or without prior notification. Contracts for research and development with prior advertisement are limited “purely to purposes of research, experiment, or development”; the contract is not to be carried out to establish commercial viability, or to recover research or development costs.<sup>147</sup> Surprisingly, a provision relating to research, experiment, or development is lacking in relation to services regulations. There is no provision equivalent to Article 10(2)(b) or (c) of the Works or Supply regulations, allowing the contracting authority to apply negotiated procedures either with or without advertisement. Neither the services regulations nor their explanatory note give any explanation for this omission.

- (iii) Where the drawing up of a specification is not possible: the services regulations permit the contracting authority to use a negotiated procedure with advertisement. This stipulation is exclusive to services regulations. No provision in Works or Supply regulations allows the authority to use a negotiated procedure with advertisement.

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<sup>147</sup> Works Regulations, Art.10(2)(b) and 13(1), Supply Regulations, Art. 10(2)(c).

In general, a specification must, as a basic rule, be drawn up to enable contractors to perform the services required. It must not be drawn up with the intent to preclude any contractor or provider from participating in the procurement competition. However, the regulations recognise that because of the nature of some services, for example, insurance, banking or investment services,<sup>148</sup> specifications drawn up for a particular provider permit only that provider to participate in the competition. Therefore, the services regulations allow the contracting authority to advertise its intention to use a negotiated procedure to provide such services. In addition to financial services, Article 10(2)(c) allows the contracting authority to use negotiated procedures with advertisement in the case of "intellectual services", if the specifications for such services do not allow the contract to be awarded using open or restricted procedures.<sup>149</sup> The regulations, however, do not define "intellectual services" and it is therefore not clear what is meant by them. The nature of some categories mentioned in Parts A & B, schedule 1, such as market research, advertising services, legal services and educational services, indicates they are intellectual because they are not purely mechanical functions.<sup>150</sup> In contrast, other services mentioned are not intellectual, such as transport either by land, air

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<sup>148</sup> Services regulations, Schedule 1, Part A, and Category 6. It must be noted that these financial services differ from other financial services connected with the issue, sale purchase or transfer of securities and central bank services.

<sup>149</sup> Services Regulations, Art. 10(2)(c).

<sup>150</sup> P. Trepte, *supra* n. 140, p. 129.

or sea, architectural services, cleaning of buildings, and telecommunication services.

#### **d. Competitive Dialogue Procedure**

The new EU Public Sector Procurement Directive (2004/18/EC) introduces a new tendering procedure, the Competitive Dialogue, to complement the existing open, restricted, and negotiated procedures. For complex contracts, the new directive allows a 'dialogue' between awarding authorities and tenderers to determine the contract conditions. During the course of this 'dialogue', tenderers and the contracting authority may discuss all aspects of the contract ensuring equality of treatment for all tenderers.<sup>151</sup> They must not provide, in a discriminatory manner, information that is likely to place certain tenderers at an advantage over others. In addition, the transparency principle must not be adversely affected by this 'dialogue'.<sup>152</sup> Further, such 'dialogue' should not substantially alter fundamental aspects of the tender or distort competition. The contracting authority not only has the option to reduce the number of candidates that participate in the dialogue in the selection phase, but also during the dialogue phase to shortlist candidates and thereby indirectly reduce the number of participants.<sup>153</sup> To make use of this procedure, the contracting authority has to state either in the contract

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<sup>151</sup> C. Bovis, '*supra* n. 69, p. 152.

<sup>152</sup> R. Williams, 'The New Procurement Directives of the European Union, 4 (2004), *Public Procurement Law Review*, p. 153.

<sup>153</sup> A., Rubach-Larsen, 'Competitive Dialogue' in R. Nielson and S. Treumer (ed.), *The New EU Public Procurement Directives*, (Djof Publication, 2005), p.75

notice or in the contract documentation that recourse is being made to one of these options.<sup>154</sup>

The EC Directive defines Competitive Dialogue as "a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender".<sup>155</sup> The contracting authority has the right to use this type of award procedure if it believes that use of other tendering procedures, open and restricted procedures, will not allow the award of the contract. According to Article 29(1), Competitive Dialogue is intended to be used for large, complex projects in circumstances where the contracting authority considers the use of open or restricted procedures will not enable the award of a contract.<sup>156</sup> A contracting authority which aims to carry out particularly complex projects may, not due to any fault on its part, be unable to find technical or financial solutions in the procurement market. This situation may especially arise with regard to integrated transport infrastructure projects and large computer networks.<sup>157</sup> There are two conditions for applying the competitive dialogue procedure. First, the contract shall be awarded on the sole basis of the award criterion, i.e. the most economically advantageous. Second, the contract must be 'particularly complex'. Article 1(11)(c) defines 'particularly complex' as where contracting

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<sup>154</sup> *Ibid.*, p. 75, New EC Public Sector Directive, Art. 29(4).

<sup>155</sup> New EC Public Sector Directive, Art. 1(11)(c).

<sup>156</sup> S. Treumer, Competitive Dialogue, 4 (2004), *Public Procurement Law Review*, p. 178.

<sup>157</sup> New EC Public Sector Directive, Art. 31.

authorities are not objectively able to define the technical means in accordance with Article 23(3)(b),(c) or (d), not capable of satisfying their needs or objectives and/or are not objectively able to specify the complex and/or financial requirements of a project.

Before using Competitive Dialogue as an award procedure, the contracting authority may seek or accept advice from experts which may be used in preparation of the specifications. However, such advice should not hinder the tendering process.

Similar to other tendering procedures, the contracting authority should advertise procurement opportunities and invite tenderers to carry out the work. An invitation to tender should set out the 'needs and requirements' of the authority either in the advertisement or in the contract documentation.<sup>158</sup> The contracting authority is under obligation to invite at least three tenderers to tender.<sup>159</sup> The criterion for selecting the winning tenderer is the most economically advantageous procedure, not lowest price.<sup>160</sup>

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<sup>158</sup> *Ibid*, Art. 29(2).

<sup>159</sup> *Ibid*, Art. 29(3).

<sup>160</sup> S. Arrowsmith, "An Assessment of the New Legislative Package on Public Procurement", (2004) 41 *Common Market Law Review*, p. 1285.

**F. A comparative analysis**

In addition to a comparative analysis between Saudi and UK procurement systems undertaken throughout this chapter, this section will examine similarities and differences between the two during the preliminary stage of the competitive tendering procedures.

Unlike the UK procurement contract regulations, which define the meaning of contractor, the Purchasing Law does not define terminologies cited in its provisions. This lack compels judges, researchers, lawyers and public agencies to research and find analogies between present and prior cases and regulations. This lack is one of the weaknesses of the Purchasing Law which needs be remedied. Judges and researchers use the Classification Act as basis for defining a contractor. Because this Act does not provide a clear definition, they rely on the classification levels into which divided the capital of firms is divided and which prevent firms registered in lower level from carrying out work specifically assigned to those in higher levels. This Act also requires private firms to specify their activities according to procurement work, such as supplier of goods, or specialist in maintenance services, or construction. A contractor may be defined as a supply contractor or construction contractor according to the main procurement activities that he provides. Saudi law-makers might avoid this complicated way of defining a contractor by adding definitions to the Purchasing Law.

Procurement regulations under the two systems have similar rules prohibiting discrimination in specifications. Contracting authorities under the two systems must not design the technical specifications around a specific

product, either by referring to a particular type of product, or specific trade mark. This prohibition is introduced to ensure genuine competition between all tenderers interested in participating in the procurement activity.

Another difference between the two systems is Saudi regulations require contracting authorities to use Saudi national standards to design their specifications while UK procuring entities are required to use EC technical standards in their specifications. However, the UK regulations take into account differences between products and services in other EC member states and allow UK public agencies to use their national standards if other states' technical standards are incompatible with equipment already in use.

The Saudi government realises that large projects executed in the country are performed through international firms. Therefore, it has taken steps to develop its local standards in order to eliminate differences between national and international specifications. It has joined several international standardisation organisations and changed many of its national standards in order to comply with international standards. This development assists foreign contractors to conduct business in the Saudi procurement market.

Another difference between the two systems is the use of modern technology to publish procurement projects. Unlike UK regulations, the Purchasing Law prevents public agencies from accepting any tender received via telex, telegram or telefax, or through electronic email. It obliges public agencies to accept tenders dispatched through the post office or personally handed to public agencies. This policy is indicative of the obsolescence of the Purchasing Law and the necessity to update the use of new technology.



Another difference between the two procurement systems is the way in which procurement activities are publicised. The UK regulations require public agencies to publish their procurement projects in advance, at the beginning of the financial year to facilitate interested tenderers' preparation to participate in the procurement market. In contrast, Saudi regulations only require contracting authorities to publish their procurement activities several months before their performance is expected to commence. Therefore, Saudi Purchasing Law might benefit from the advertisement procedures required by UK regulations and develop its publication criteria. The UK publication process might provide useful lessons for the Saudi system because its procurement activities published at the beginning of the financial year allowing tenderers to prepare their tenders well in advance.

The most important difference between the two systems is the adoption of a new tendering procedure under the UK regulations. This reflects the influence of the EC on the development of the procurement sector in its member states. The Saudi system applies three types of tendering procedures: open, selective, and negotiated, while the UK not only applies these three tendering procedures but has adopted a 'competitive dialogue procedure', a new procedure introduced by new EU public sector regulations to achieve procedural simplification and flexibility, to ensure quality and efficiency of procurement, and allow the contracting authority to achieve best value for money. A 'competitive dialogue procedure' is adopted for complex project. This new tendering procedure is a practice Saudi law-makers should

take into account when developing their tendering procedures and considering new ways to implement them.

In addition to the difference in tendering procedures aforementioned, it worth noting that UK public agencies use the open tendering procedure if they wish to use the 'lowest price' as the award criterion and the restricted tendering procedure if they intend to use the most economically advantageous tender as the award criterion. The latter is particularly suitable for complex procurement schemes. Saudi practice differs. It is not usual to award the contract based on the most economically advantageous tender. The Purchasing Law emphasises the lowest price criterion, even when inviting selected contractors in the limited tendering procedure.

The two systems are similar in requiring contracting authorities to publicise their projects openly in the Official Journals. However, UK regulations are more precise than Saudi regulations in that they require public agencies to follow a particular procedure to publish procurement opportunities and to use limited numbers of words in each advertisement. Moreover, the information included in the tender notice is very important and the contracting authority must apply it, while under the Purchasing Law such notice is not deemed largely binding, merely a notice to invite interested contractors to participate in the tendering process.

There are differences in the use of direct and negotiated tendering procedures in the two systems. While UK public agencies use the negotiated procedure in very limited circumstances, such as when open and restricted procedures fail to produce a suitable contractor to carry out the work, Saudi

Purchasing Law encourages use of the direct purchasing as the primarily process. Saudi public agencies use direct purchasing to purchase their needs from small or medium size enterprises in order to help them stay in the market, if the value of the contract does not exceed one million Saudi Riyals, and, if no suitable tenders have been submitted in prior open or selective tendering procedures.

Another difference between the two systems is apparent in the selective tendering procedure. The Purchasing Law requires public agencies to invite at least five tenderers to submit their tenders to carry out the work while the UK regulations require UK public agencies to invite between five and twenty contractors in order to promote genuine competition. The basis for the selective procedure is the selection of a certain number of tenderers to submit their tenders, limited under UK procurement contract regulations but unlimited under Saudi Purchasing Law. In view of the latter, the procedure cannot be considered selective. For selective procedures the number of tenderers invited to tender should be clearly defined.

A further similarity between Saudi and UK procurement regulations is allowing contracting authorities to contract directly without prior publication in the Official Journal. If the price of all tenders received is higher than the market price, the contracting authority has the right to negotiate directly with tenderers in order to dictate the cost of the work and to contract directly with one of them. This condition also applies if no one submits a suitable tender in open or limited procedures, in the case of urgency, or when the contract can only be carried out by a particular contractor because of technical reasons, or

the need to protect exclusive rights, such as intellectual property, patent, or trade name.

Finally, the EC public procurement sector has recently adopted new tendering procedure for complex projects known as the Competitive Dialogue procedure. This procedure gives the contracting authority and the private firm an opportunity for 'dialogue' in order to discuss all aspects of the contract and to determine its terms and conditions. Saudi procurement regulations might benefit from the new development in UK procurement regulations.

## **Summary**

This chapter has investigated the preliminary steps which the contracting authority must take before awarding a contract. It has clarified the meaning of contractor, the preparation of specifications and bidding documents, publication of the tender notice, and methods for obtaining tenders, and compared practice under Saudi and UK public procurement contract regulations.

Unlike UK regulations, which define the meaning of contractor, the absence of such definition in the Purchasing Law, necessitates public agencies, judges, researchers and lawyers having to make analogies with other Saudi regulations to define its meaning.

Second, the preparation of specifications is a substantial element in both Saudi and UK tendering regulations. Specifications must be clear, concise, and unambiguous. They must not create any obstacles to trade, therefore, should not refer to a particular trade mark or name, patent, or

specific design. Both Saudi and UK regulations are flexible regarding the use of either international or national standards. A UK contracting authority, for example, may refer to national standards if the European specification, which has priority over the British specification, might entail disproportional cost, or difficulties.

The analysis of tendering procedures reveals the Purchasing Law does not specify when the contracting authority should use open or other tendering procedures. It contains only general provisions allowing the contracting authority to use either procedure. In addition, there is no competitive bidding in the direct purchasing procedure. This has led government agencies to invite contractors, which prevents others from participating in the direct purchasing procedure. New regulations therefore need to be cited under the Purchasing Law that identify the specific circumstances under which this procedure should be used.

It has been submitted in this chapter that when the Saudi contracting authority invites tenders it should translate the documentation of conditions and specifications into English, French and Spanish to assist foreign tenderers to participate in the procurement competition, even if the Purchasing Law does not expressly stipulate this. Moreover, the Purchasing Law does not require the notice advertising the procurement opportunity to be published outside the country, which is a defect that should be remedied.

In addition, unlike UK procurement regulations, the Purchasing Law does not include any regulation or circular permitting the contracting

authority to use any accelerated procedure, such as telex or telefax, or publish invitations to tender on its Web pages.

Finally, neither the Purchasing Law nor UK procurement regulations rule nullification of the tender if the advertisement inviting tenders is not done in the manner the law stipulates.

This chapter has examined the rights of tenderers before the award of a contract. The following chapter will investigate their rights during and after the award of a contract.

## Chapter six

# Evaluation of Tenders and Awarding of the Contract

## **Chapter Six: Evaluation of Tenders and Awarding of the Contract**

### **Preamble**

When a contracting authority contracts with a private firm for the supply of goods or construction, their interests become intertwined. Thus, although the aim of the firm is to achieve a monetary interest, it becomes a partner with the public authority in the performance of a public function. The public authority's obligation to follow a competitive tendering procedure before awarding the contract helps it to obtain the best value for money. Such procedure also encourages the private firm to develop its technical and financial ability in order to be able to compete. In addition, competitive tendering is preferred in most procurement regulations as the mechanism for awarding the contract, because it is one of the best ways for the contracting authority to obtain a competitive price.

Once tenders have been submitted, the contracting authority is required to examine them and decide which one it prefers.

There are many factors which the contracting authority must take into account when evaluating submitted tenders, including legal and technical factors. Under legal factors, the authority must offer all interested contractors an opportunity to participate in the tendering procedure. Technical factors relate to different aspects of the tenderer's qualifications, which enable the authority to evaluate his ability to perform the contract and, if necessary, exclude him from the competition. Therefore, several factors should be taken into account before the evaluation process, such as opening all tenders and announcing all prices in the presence of all tenderers, ranking all tenders



according to their prices, and reporting any objection or reservation included in a tender. After these preliminary steps, the authority must evaluate all tenders and select one tenderer as the contractor.

The previous chapter discussed the initial stage in the tendering process and described how tenderers submit their tenders to join the procurement competition. This chapter will investigate the middle and final stages before selecting the contractor. It will be divided into two parts: the evaluation of tenders and awarding of the contract. The first part will focus on the qualifications of tenderers and termination of the tendering process, while the second part will explore awarding procedures under Saudi Purchasing Law and UK procurement contract regulations. A comparative analysis of the two procurement systems will be undertaken before the end of the chapter.

## **I. Evaluation of Tenders**

As indicated in chapter five, once the Opening Committee has finished opening and investigating each tender, it should submit a report to the Evaluation Committee for it to perform its task. The opening report must describe the situation of each tender and the position of all tenderers, and draw up a ranking of tenders. Relying on such report, the Evaluation Committee should then commence its procedures to choose the most suitable contractor.

The evaluation process is the most important stage before selection of the successful tenderer. Usually, tenderers are not permitted to attend the evaluation process. The Evaluation Committee is entrusted with the task of

comparing the various prices submitted in order to select the best tender. Several criteria should be taken into account during the evaluation process. Price, technical suitability, financial ability, tenderers' professional history, performance, quality, and profitability are common criteria used to select the successful contractor.

A comparison of evaluation procedures under Saudi and UK procurement regulations shows the evaluation basis differs in the two systems. Under UK regulations, for example, the public authority must indicate in the contract documents the basis of the evaluation, such as the lowest price or the most economically advantageous tender. Saudi Purchasing Law, in contrast, leaves the award basis to the discretion of the public authority.

This section, which examines the evaluation of tenders, will be divided into two parts; the first will analyse evaluation procedures under Saudi Purchasing Law, the second will examine the UK evaluation process.

## **A. Evaluation procedures under Saudi Purchasing Law**

### **Preamble**

Most procurement systems have similar qualification systems to select the tenderer qualified to perform the work. Tenderers' technical ability and financial standing to carry out the work are considered in the evaluation process.

Before analysing the qualification system under the Purchasing Law, it is necessary to explain the Evaluation Committee's task, which is divided into

two parts: routine and technical procedures, although the focus is more on governmental or routine procedures than technical ones. The first part of its task involves drawing up guidelines for the evaluation procedure, voting procedures for electing committee members, membership criteria, e.g. each member's government grade, and defining the extent of the Committee's power to negotiate with tenderers. In addition, it promotes the establishment of Evaluation Committees in each ministry and in each public agency. Each Committee includes at least three members chaired by an official whose government grade is not below the twelfth grade.<sup>1</sup>

The second part of the Committee's task is concerned with technical procedures. In fact, the Implementing Regulations include one article which requires the Committee to ensure tenders conform to the specifications and conditions set out in the contract's documentation. It authorises the Committee to seek assistance whenever necessary from any technician or professional expert in financial or technical aspects.<sup>2</sup>

The following will describe and discuss the qualification system under Saudi procurement regulations.

### **1. Qualification System**

The qualification of tenderers is an important principle in procurement procedures. It involves checking their suitability to carry out the work. If the tenderer fails to meet suitability criteria, he is excluded from the award

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<sup>1</sup> Implementation of Purchasing Regulations (Implementing Regulation), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 16. It should be borne in mind that routine or governmental procedures will not be given much attention in this study because it addresses governmental or routine procedures only in regard to how the Evaluation Committee is established and its members are nominated.

<sup>2</sup> *Ibid*, Art. 16.

procedure. There are many ways to check the suitability of tenderers. Procurement laws and regulations set certain conditions to distinguish the capability of competitors. These relate to technical suitability and financial ability.

The qualification principle gives the contracting authority the power to exclude any tenderer who does not satisfy the award criteria or is not capable of carrying out the work. Procurement laws and regulations emphasise that a contracting authority is obliged to state or make transparent the requirements or conditions for contractors' eligibility to participate in the procurement competition.

Unlike UK procurement regulations, which provide guidance on to how to select a qualified contractor,<sup>3</sup> the Purchasing Law does not provide any such guidance. It only requires the Evaluation Committee to "take into account the financial and technical aspects of tenderers during the evaluation procedure".<sup>4</sup> However, practice reveals that the Evaluation Committee usually checks tenderer's suitability to execute the contract according to financial ability and technical suitability. Each will be analysed separately below.

#### **a. Technical ability**

This factor requires the contractor to provide some proof of his previous experience of similar work, which will be taken as evidence of his ability to perform the work required.

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<sup>3</sup> The Public Works Contract Regulations 1991 (Works Regulations), no. 2680, Part IV, The Public Supply Regulations (Supply Regulations), 1995, no. 201, Part IV, and Public Services Contract Regulations (Services Regulations), 1993, no. 3228, Part IV.

<sup>4</sup> Implementing Regulations, *supra* n. 1, Art. 16.

Classification is an important process proving the technical capacity of contractors. It requires firms to be specialists in certain types of procurement and to limit their participation to projects of a certain value. Classification is recognised as providing an essential indicator of the contractor's financial and technical ability.

Contractor classification is necessary before firms can enter bids for government contracts. Classification specifies the contractor's abilities and his financial and managerial situation. The aims of classification are to develop and state the ability of contractors to operate in the contracting fields of construction, maintenance and operation, by categorising their scientific experience, technical and financial ability. The specialties of contractors and degrees of classification are so defined as to guarantee the successful execution of contractors. Classification prevents contractors from entering into contracts beyond their capabilities.

Principal fields of operation are defined and activities are listed under each field. For each field and activity, maximum limits in millions of Saudi Riyals are set for projects which may be given to a contractor.<sup>5</sup> Classification covers only the construction, maintenance and operation fields. It includes five levels divided into 25 sectors. For example, building construction thresholds range from SR 200 million (£33,333,000) for the first level to SR five million (£833,000) for the smallest or fifth level. The classification levels for foreign contractors are triple those of local contractors. They start from 75 million Riyals (£12,500,000) for the fifth level and rise to 600 million Riyals

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<sup>5</sup> Circular no. 6330 / 401 dated 10 / 11 / 1401 AH (1981).

(£100,000,000) for the first classification level.<sup>6</sup> The contractor has the right to challenge the classification level assigned to him by the Classification Act 1985, presenting the case to the Minister of Public Works and then appealing to the Board of Grievances.

Contractor classification ensures tenders from unclassified contractors or those whose qualifications are not in keeping with the project's scale are rejected. No tender can be accepted without an accompanying certificate of classification whose financial limit is above the project's cost. A contractor does not have the right to compete for a project or submit a tender which is above his classification's financial limit, which will have been decided according to his financial and technical ability. Foreign contractors are required to include with their tenders a bank statement detailing their current financial standing, a list of the works previously carried out, and certificates of satisfactory performance of work similar to that for which they are bidding.<sup>7</sup>

A copy of the classification certificate must be included with the bid documents. If the contractor fails to attach such certificate, the Evaluation Committee will decide whether to accept or reject his tender. If the tender price is within or less than his classification's financial limit, he may not be excluded. His tender will be rejected if the tender price is higher than the financial limit of his classification.<sup>8</sup>

The Purchasing Law does not specify any penalty for failure to provide a copy of the classification certificate in bid documents. If the contractor fails

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<sup>6</sup> Public Works Ministry Circular no. 255 / HR dated 21 / 4 / 1413 AH (1993).

<sup>7</sup> Royal Order no. 22884 dated 11 / 10 / 1401 and Circular no. 6330 / 401 dated 10 / 11 / 1401 AH (1981).

<sup>8</sup> Finance Ministry Letters no. 17 / 13551 dated 8 / 9 / 1379 AH (1977).

to such classification, the contracting authority has two choices: first, it may ask him to submit his classification certificate if his tender is the lowest price, or it may plan to negotiate with him to reduce his price. Second, it may reject his tender, if his previous experience indicates that he has not previously been awarded a contract in the same category for which he is tendering. If the contractor's classification certificate expires before the deadline for receiving tenders and the contractor has forgotten to submit it with his tender, the contracting authority has the right to reject his bid. If he forgets to submit it and it expires after the deadline for receiving tenders, the contracting authority may request him to renew it and submit the new certificate.<sup>9</sup>

For a construction contract, invitations to tender should be sent to no less than five tenderers who can participate in the procurement activity because its anticipated cost falls within the financial limit of their classification level.<sup>10</sup> Article 3(a) of the Purchasing Law does not, however, mean that an invitation may not be addressed to unclassified contractors. The Council of Ministers allows contractors to execute small projects, up to a limit of 10 million Saudi Riyals (£16,666,000) without need of classification.<sup>11</sup>

In 1985, the Finance Ministry noted that some government departments were overstating the classification level when preparing specifications for some projects which did not call for a high standard of execution. The classification level of the work was higher than the market

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<sup>9</sup> Circular no. 86 dated 4 / 8 / 1419 AH (1998).

<sup>10</sup> Purchasing Law, Royal Decree no: M / 14 dated 7 / 4 / 1397 AH (1977), Art. 3(a).

<sup>11</sup> The Council of Ministers' Decision no. 892 dated 19 / 7 / 1395 AH (1975).

price, which prevented unclassified contractors and some classified ones from participating in the work. This had the effect of confining procurement opportunities to specific firms of contractors.<sup>12</sup>

Reclassification of contractors is repeated every three years to allow for changes in contractors' situations, and to take into account success or failure in projects they undertake.

The Ministry of Public Works insists contractors provide all information regarding changes occurring in their firms which might affect their classification. Any warning issued to contractors, fines levied, errors in execution, or breaking of a contract must be taken into consideration when classifying or reclassifying a contractor.

It should be mentioned that the Gulf crisis (1990) modified the government's expenditure priorities and affected the general rule on classification levels. It forced the government to waive its rights to apply the classification rules in some projects. The Council of Riyadh City, for example, abolished the condition of technical suitability in the cleaning of Riyadh City and agreed to deal with unclassified contractors, because its budget could not cover the price of bids received. The Board supported this approach and allowed Riyadh City Council to waive its right to request a specific level of classification to tender for cleaning the city.<sup>13</sup>

If an unclassified contractor joins or makes a consortium with other classified contractors in order to participate in a contract higher than his level

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<sup>12</sup> A. Al – Wehaiby, "The Organizing Principles for Administrative Contracts and its Applications in Saudi Arabia", (1<sup>st</sup> Edition, Riyadh, 2002), p. 68.

<sup>13</sup> *Case no 920 / 1 / K dated 1418 AH (1998).*



of classification, he will be allowed to carry out the work if the price of the contract does not exceed twice the threshold of his category. For example, if his category threshold is 10,000 million Saudi Riyals (£1,666,000), the price of the work to be carried out must not exceed 20,000 million Riyals (£3,333,000). The Public Works Ministry set this condition because it noted that many unclassified and classified contractors in lower categories than the contract price joined together with higher category classified contractors in order to benefit from their classification level, and consequently secured work beyond their individual financial and technical ability.

Another way for the contractor to prove his technical capability is to attach a certificate of his previous experience to his tender. This certificate will give the contracting authority some idea of the contractor's performance and the procurement sector in which he specialises. In practice, only foreign contractors are required to provide such certificate when working in the Saudi procurement market. Royal order no. 22884 dated 11/10/1401 AH (1980) and circular no. 401/6330 dated 10/11/1401 AH (1980) require them to attach a copy of their bank statement, a procurement contract certificate for work executed by them during the last two years, and a copy of their annual budget for two years prior to their intention to contract with the public agency. Similarly, the Finance Ministry encourages public agencies to request local contractors to attach a copy of their bank statement with their tender if they want to deal with public agencies.<sup>14</sup>

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<sup>14</sup> Circular no. 17/30 dated 26/7/1407AH (1987).

Finally, it should be mentioned that a tenderer may be excluded from the award procedure if he possesses a bad reputation from previous dealings with public agencies. A good reputation means that the contractor has not been excluded from participating in government contracts in the last five years. The contractor's reputation is affected if he has been convicted of an offence<sup>15</sup> resulting from misconduct in his professional capacity, has been barred under a provision contract,<sup>16</sup> has been made bankrupt or is subject to proceedings for a declaration of bankruptcy.<sup>17</sup> Public agencies are obliged to inform the Finance Ministry of any cheating, crime, forgery, or professional misconduct committed by contractors during contract execution.<sup>18</sup>

### **b. Financial stability**

This requirement aims to check the contractor's ability to complete performance of the contract by analysing his financial standing to ensure that he has a sufficient budget to perform the contract.

The contracting authority must be fully satisfied that a contractor can perform the work before it contracts with him. It may investigate the financial history of the contractor and use various means to vet the financial stability of each contractor. The Finance Ministry had noted that some contractors were

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<sup>15</sup> The Council of Ministers's Decision no. 11 dated 26 / 2 / 1400 AH (1980).

<sup>16</sup> *Ibid.*, Art. 1 (g).

<sup>17</sup> *Ibid.*, Art. 1 (d).

<sup>18</sup> The Finance Ministry has established a primary judicial committee to decide the legality of the exclusion decisions and the period of the exclusion. Contractors may appeal to the Board within sixty days of the date of the decision. As a result, the contracting authority does not have jurisdiction to prevent any contractor from participating in a contract. It must first obtain a decision from the judicial committee to exclude him. In this regard, the Board, in *Case no. 109 / 1 / T, dated 1414 AH (1994)*, overrode the decision of the Education Ministry which rejected the tender of a contractor because some of his previous contracts had been withdrawn. The Board held that the rejection decision should have been issued by the judicial committee, not by the Education Ministry.<sup>18</sup> After the expiry date of the exclusion decision, excluded contractors may participate again in government contracts. In practice, the Finance Ministry is obliged to send a letter to all public agencies, confirming that dealings with the contractor in question are permitted. (see A. Al - Wehaiby, *supra* n.12, p. 75).

awarded procurement contracts while embroiled in financial disputes with some government agencies.<sup>19</sup> Consequently, in a circular to all public agencies, it requested them to investigate the financial stability of contractors before awarding them a contract. It also advised them to set a clause in the contract document requiring contractors to furnish a bank statement showing their financial capacity.<sup>20</sup>

## **2- Non-compliance with specifications**

It has been mentioned in chapter four that specifications must be clear, concise, and unambiguous in order to be performed in the way that the contracting authority requires.

The Evaluation Committee is responsible for ensuring that all tenders received comply with the specifications. Article 1(g) of the Purchasing Law states that 'the acceptance of tenders shall be only according to the conditions and specifications laid down'.<sup>21</sup> Tenderers are required to adhere to the specifications of the contract documentation. The contracting authority has the power to reject any tender that contains specifications differing from those published by the contracting authority, even if the differentiation is not fundamental. Accordingly, the Finance Ministry ordered the Post and Telegram Ministry to reject a tender even it only slightly contravened the specifications.<sup>22</sup>

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<sup>19</sup> A. Al - Wehaiby, *supra* n. 12, p. 70

<sup>20</sup> Circular no. 255 dated 21 / 4 / 1413 AH (1993)

<sup>21</sup> Purchasing Law, *supra* n. 10, Art. 1(g).

<sup>22</sup> Finance Ministry Letter no. 21/10009 dated 26/6/1397 AH (1997).

It is worth noting that there are two stages for compliance with specifications; first compliance with specifications during the tendering process, and second, compliance with specifications during performance of the contract. In the first stage, a tenderer is required, as mentioned above, to include in his tender specifications that not contradict specifications in the contract documentation, otherwise, his tender may be excluded from the procurement competition. In the second stage, the contractor is under responsibility to perform his contract according to the contract specifications. If he performs different specifications the contracting authority has the right to reject his performance and warn him that he must adhere to the contract specifications. If he continues to perform different specifications the contracting authority has the power to suspend the work or terminate the contract as mentioned in chapter eight. In this regard, it was indicated in chapter four in reference to case no. 3224/1/K that King Saud University contracted with a contractor to supply drinking water (20000 tonnes) from the pipes of the Ministry of Agriculture, but the contractor supplied part of the water from his own pipes, whose health and safety standards were lower than those of the Ministry's pipes. The university accepted the water but refused to pay the contractor for the water he had supplied from his own pipes. The Board held that King Saud University should have refused the 20000 tonnes of water, because the contractor's pipes' health and safety standards were lower than those specified in the contract. However, because the University had accepted this water, it was required to pay the contractor

for it according to the price which then prevailed in the market, not the contracts price.<sup>23</sup>

## **B. Evaluation procedures under UK Procurement Regulations**

Similar to Saudi practice, UK procurement regulations apply the qualification principle to test the ability of tenderers to perform the work required. In practice, the UK Evaluation Committee is required to evaluate all tenders and reject "ineligible" tenders or tenders that do not meet certain conditions.<sup>24</sup> There are many reasons for rejecting "ineligible" tenders, some of them related to qualification test criteria, such as the technical ability and financial capacity of the tenderer. Tenderers must be qualified to execute the work. "The authorities awarding contracts are required to ascertain that a contractor's economic and financial standing and technical knowledge and ability are sufficient for works corresponding to his classification. The Evaluation Committee is entitled to reject a tender submitted by a contractor who does not fulfil the required conditions".<sup>25</sup> The regulations therefore give the public authority power to reject a bankrupt tenderer, either if he appears unable to pay his creditors or he becomes insolvent.<sup>26</sup>

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<sup>23</sup> Case no. 3224/1/K dated 1410 AH (1990).

<sup>24</sup> Works Regulations, Art. 14 (1)(a)(b)(c), Supply Regulations, Art. 14(1)(a)(b)(c), Services Regulations, Art. 14 (1)(a)(b)(c), and Utilities Regulations, Art. 19 (2)(a).

<sup>25</sup> Case 27-29/86, *S.A. Constructions et Entreprises Industrielles (CEI) and others v. Societe Cooperative "Association Intercommunales Pour les Autoroutes des Adennes"* (CEI and Bellini), [1987] E.C.R.3347, para. 25.

<sup>26</sup> Works Regulations, Art. 14 (1)(a)(b)(c), Supply Regulations, Art. 14(1)(a)(b)(c), Services Regulations, Art. 14 (1)(a)(b)(c), and Utilities Regulations, Art. 19 (2)(a).

**1. Qualification System**

The motive underlying the qualification system is identification of tenderers who are capable of performing the contract successfully.<sup>27</sup> The contracting authority is required to list the qualification factors in the tender notice.<sup>28</sup> The qualification process acts as a green light or signal for tenderers to be allowed to enter the procurement process, and is required in the early stage of the tendering process. The tenderer who possesses full technical and financial capabilities may be selected as the contractor.

In practice, there are two ways to select tenderers; to exclude tenderers who are not eligible according to Article 14 of Works, Supply and Services Regulations (see section c below), or checking the suitability of remaining tenderers according to their technical and financial ability (see sections a & b below).

Criteria for checking the suitability of tenderers vary according to regulations. Works regulations, for example, contain different criteria to Supply or Services regulations. For example, the "equality" criteria are listed in Article 21 (2) of the Supply and Services, but not listed in the Works regulations. However, this omission does not prevent the contracting authority from using the quality factor to check the technical suitability of tenderers.

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<sup>27</sup> P. Trepte, 'Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation', (Oxford, Oxford Uni. Press, 2004), p. 317.

<sup>28</sup> Works Regulations, Art. 14 (1)(a)(b)(c), Supply Regulations, Art. 14(1)(a)(b)(c), Services Regulations, Art. 14 (1)(a)(b)(c), and Utilities Regulations, Art. 19 (2)(a).

To explore the qualification system in more detail, the technical ability, financial suitability and general suitability of tenderers will be analysed separately below.

**a. Technical ability**

Tenderers are required to prove they are able not only to perform the contract but also to complete it. This factor is important because the contracting authority may exclude a tenderer from the competition if his technical ability does not meet the requirement standard of the public agency. Skills, tools, professional qualifications, history of working in a particular type of procurement, manpower, scientific research, and specialism are some factors may taken into account when evaluating the ability of the tenderer.

Article 16 of the Works, Supply and Services regulations requests tenderers to satisfy minimum technical capacity before submitting a tender. Similarly, Article 44(2) of the new public sector directive permits the contracting authority to require tenderers to meet a minimum level of experience. This minimum level must be 'related and proportionate to' the subject matter of the work required.<sup>29</sup> If a tenderer fails to meet the technical requirements, the Evaluation Committee has the power to exclude him from the competition. Checking tenderers' ability in the open tendering procedure will take place after submission of tenders, while in restricted and negotiated procedures, the contracting authority may evaluate tenderers' technical ability before sending the invitation to tender and has the right not to invite unqualified tenderers. However, the contracting authority must not

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<sup>29</sup> New EC Public Sector Directive, 2004/18/EC, O.J. 2004, Article 44(2).

discriminate against any tenderer during the evaluation of his technical or financial ability.

Article 16(2) of each set of procurement contract regulations empowers the contracting authority to specify in the contract notice the qualification requirements that tenderers satisfy before submitting their tenders. In addition to the requirements stated in Article 16(2), the *Beentjes* case cited below, permits the contracting authority to request additional qualifications not mentioned in the tender notice.

The Evaluation Committee will check the suitability of tenderers based on their technical knowledge and ability. The rejection of a tender should be based on the following grounds:

- a. Lack of specific experience in the work to be carried out.
- b. The tender does not appear to be the most suitable in the awarding authority's view.
- c. Inability of the contractor to employ long-term unemployed persons.<sup>30</sup>

In practice, technical ability describes the tender's performance ability. It provides evidence of the tenderer's record and addresses his previous history of tendering, since the latter may prove his present ability to perform the work.<sup>31</sup> Therefore, he may submit a list of his technical equipment and his manpower staff.<sup>32</sup> In addition, a prior record of timely performance of

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<sup>30</sup> *Case 31/87, Geboeders Beentjes BV v. State of the Netherlands*, [1988] ECR 4635, at 4656.

<sup>31</sup> Works Regulations, Art. 16 (1)(b), Supply Regulations, Art. 16(1)(b), and Services Regulations, Art. 16 (1)(b).

<sup>32</sup> *Ibid.*, Art. 16 (1)(c).



comparable work may be requested.<sup>33</sup> Further, the new public sector directive allows the contracting authority to request tenderers who intend to participate in public works and services contracts to provide 'an indication of the environmental management measures that the economic operator will be able to apply when performing the contract'.<sup>34</sup>

**b. Financial stability**

This criterion concerns the economic situation of the tenderer. Tenderers must be economically qualified to execute the work. This criterion is very important because the contracting authority must be satisfied that the contractor will be able to complete his performance of the contract. Accordingly, a contractor is required to meet minimum standards of economic and financial standing otherwise he will be excluded from the competition.<sup>35</sup> The regulations do not define the meaning of 'economic and financial standing'. Nevertheless, the contractor's financial ability is evidence of his ability to complete his performance of the contract and to satisfy any defect or legal liability after completion of the contract.

In practice, in the open tendering procedure, the contracting authority will consider the financial ability of the tenderer after submission of his tender, while in restricted and negotiated procedures, the contracting authority will check his financial ability before issuing the invitation letter to participate.

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<sup>33</sup> *Ibid.*, Art. 16 (1)(d).

<sup>34</sup> New EC Public Sector Directive, *supra* n. 29, Article 48(2)(f).

<sup>35</sup> Article 44(2) of the new EC Public Sector Directive states that the minimum capacity level for a specific contract shall be "related and proportionate to" the subject matter of the contract.

Article 15(1) of the Works Regulations requires the contracting authority to specify in the contract notice in the open tendering procedure and in the invitation to tender in the selective procedure the financial certificates which the tenderer should provide to prove his financial ability to carry out the work. The regulations have not clarified this matter in negotiated procedures. Article 15(3) refers only to the 'invitation to tender' which might be construed as excluding an invitation to 'negotiate'.<sup>36</sup>

Once a tenderer submits his tender it is presumed that he has finances sufficient to perform the contract. The contracting authority is not required to request the tenderer to prove that he is financially able to perform another contract in the future. This issue was raised in the *Harrow case*<sup>37</sup>, when the contracting authority requested the contractor to prove his financial standing to perform a large contract in the future. The High Court held that the contracting authority did not have the right to obtain from the contractor about his financial resources in the future. It has the right to check the financial ability of the tenderer to perform the contract for which he sent his tender. This principle has been adopted by Article 47(2) of the new public sector directive which states "An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the

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<sup>36</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement*, (London Sweet & Maxwell, 2<sup>nd</sup> ed, 2005), p. 304.

<sup>37</sup> *R v. Secretary of State for the Environment EX p. Harrow LBC*, (1997) 29 H.L.R. 1.

resources necessary, for example, by producing an undertaking by those entities to that effect".<sup>38</sup>

A tenderer is required to provide in his tender document a statement of his account<sup>39</sup> and a statement of the overall turnover of his business for the preceding year and turnover in respect of work performed in the three previous financial years.<sup>40</sup> In practice, proving a contractor's financial ability is not limited to these requirements. The contracting authority has the right to stipulate other conditions for a tenderer to clarify his economic standing. This principle was adopted in the *CEI and Bellini case*.<sup>41</sup> In this case, the plaintiff was excluded from the competition in favour of another contractor, whose tender price was higher than the plaintiff's tender, because the plaintiff had already undertaken other work which exceeded the amount the Belgian law had stipulated for performing for more than one work at the same time. The ECJ held that the total value of two or more contracts awarded to a contractor at the same time may be used to determine his financial standing. However, this condition does not exist in the EC procurement directive.

### **c. General suitability**

Under this factor, a tenderer may generally be excluded from the competition if he is viewed as unqualified according to the stipulations

<sup>38</sup> New EC Public Sector Directive, *supra* n. 29, Art. 47(2).

<sup>39</sup> Works Regulations, Art. 15 (1)(a), Supply Regulations, Art. 15(1)(a), and Services Regulations, Art. 15 (1)(a).

<sup>40</sup> *Ibid.*, Art. 15 (1)(c). Article 44(2) of the new EC Public Sector Directive requires a tenderer to provide details of the minimum value of his annual turnover.

<sup>41</sup> *Joined Cases C-27-29/86, S.A. Conestration et Entreprises Industrielles (CEI) and others v. Societe Co-operative* [1987] E.C.R. 3347, ECJ, paras 10.

indicated in article 14 of Works, Supply and Services regulation.<sup>42</sup> The stipulations can be divided into four categories: financial, technical ability, governmental requirements and criminal offences. In fact, these categories may be regarded as means to exclude tenderers from the tendering process rather than allow them to participate.

The regulations allow the contracting authority to exclude a tenderer from the evaluation process if he has bankrupt, has had a receiving administration order made against him for the benefit of his creditors, if he appears unable to pay his creditors,<sup>43</sup> if he has become insolvent according to the Scottish law, if he has not pay his tax, or if past experience shows that he is not qualified to perform the contract.

Under the governmental requirements, the authority has the right to reject the tender of a tenderer whose company is the subject of an order by the court for winding up or for the purpose of amalgamation.

A tenderer may fail to pass the qualification test if he has been convicted a criminal offences relating to the conduct of his business, or has committed an act of grave misconduct in the course of his business.<sup>44</sup>

#### **D. Recognised list of qualified contractors**

A recognised list of qualified contractors is required by the UK regulations.<sup>45</sup> Each contractor must be registered on this list and submit to

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<sup>42</sup> Article 45 of the new EC Public Sector Directive includes similar requirements for excluding tenderers.

<sup>43</sup> Works Regulations, Art. 14 (1)(a), Supply Regulations, Art. 14(1)(a), and Services Regulations, Art. 14 (1)(a).

<sup>44</sup> M. Piselli, The Scope for Excluding Providers who have Committed Criminal Offences under EU Procurement Directives, (2000) 9 *Public Procurement Law Review*, p. 267.

the contracting authority a certificate of registration stating his classification. Registration is based on several factors, namely financial stability, technical ability, professional qualifications, experience, and a list of works carried out over the last five years. Such registration may be used by contractors as evidence of their suitability. Nevertheless, contracting authorities have the right to check contractors' actual financial and technical ability and their ability to perform works corresponding to their classification.<sup>46</sup>

UK public agencies are required to accept EC contractors if they are registered on this list. A recognised list gives all qualified contractors an opportunity to participate in public procurement, and, in turn, protects their right to enter procurement competition in the UK and the EC. Access to UK procurement contracts is limited to those contractors who are registered on the recognised list.<sup>47</sup>

EC member states have the right to maintain their own recognised lists, but they must ensure that such lists are not used to favour local tenderers or hinder procurement activity. Any EC tenderer has the right to register on any EC recognised list if he satisfies the requirements for such registration.

It is worth mentioning that the Saudi Purchasing Law does not include any provision either requiring or encouraging public agencies to use such a list. Further, public agencies are not required to establish a recognised list. Nevertheless, there is nothing preventing them from establishing such a list,

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<sup>45</sup> Work Regulations, Art. 18, Supply Regulations, Art. 19,

<sup>46</sup> Trantafyllou and Mardas, Criteria for Qualitative selection in Public Procurement: a Legal and Economic Analysis, (1995) 4 *Public Procurement Law Review*, p. 145.

<sup>47</sup> S. Treumer, The Selection of Qualified Firms to be Invited to Tender under E.C. Procurement Directives, (1998) 6 *Public Procurement Law Review*, p. 147.

except to ensure that it is not used to discriminate in favour or against particular contractors.

### **E. Non-compliance with specifications**

Tenderers are required to comply with specifications as stipulated in the contract documents. The contracting authority has the right to reject any tenderer not complying with specifications. In this regard, one may distinguish between minor and major non-compliance. In the case of major non-compliance, i.e. when the tenderer includes in his tender specifications differing what the contract documents require, the contracting authority has the power to reject such tender. The *Storebealt* case<sup>48</sup> supported this principle. In this case, the Danish government invited tenders to build the construction of bridge across the Western Channel of the Great Belt in Denmark. The contract conditions required the contracting authority to draw up three different construction projects, and permitted, in addition, tenderers to send alternative specifications proposed by them. Accordingly, contractors sent their tenders which included alternative specifications. The Danish government conducted negotiations with tenderers and selected one of them as the contractor. During the negotiations, the Danish government amended Clause 3 of the contract to comply with the alternative specifications proposed by the selected contractor. The ECJ rejected the award of the contract to the selected contractor on two grounds: infringement of equal treatment principle and acceptance a tender which included specifications

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<sup>48</sup> C-243/89 Commission v. Denmark (the *Storebealt*) [1993] ECR I-3353, paras.35-40.

that differed from what the contract documents required. It held that all tenderers must comply with tender conditions so as to ensure an objective comparison of tenders submitted by all tenderers.

In the case of a minor non-compliance tender, the contracting authority has the discretion to decide whether to accept or to reject such tender. It may accept a non-compliance tender if so doing will not create any significant inequity between tenderers, and the extent of non-compliance is limited.<sup>49</sup>

## **II. Awarding Procedures**

This part of the thesis will investigate the final tendering procedural stage, the awarding of the contract. It will be divided into three parts. The first will explore award criteria under Saudi and UK procurement contract regulations. The second part will discuss tender termination. The third part will focus on the awarding of the contract.

### **A. Awarding procedures under the two procurement systems**

This part will explore awarding procedures under the Purchasing Law and UK procurement contract regulations.

#### **1. The award criteria under the Purchasing Law**

After drawing up a ranking of tender prices, the Opening Committee<sup>50</sup> sends its report to the Evaluation Committee, which should examine each

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<sup>49</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement*, (London Sweet & Maxwell, 2<sup>nd</sup> Ed, 1996), p. 497.

<sup>50</sup> Saudi Purchasing Law provides for two committees to be established, one for opening tenders known as the Opening Committee, and the other for evaluating tenders known as the Evaluating Committee.

tender in order to check if it complies with the conditions and specifications detailed in the contract documentation.

If the Evaluation Committee find tender are much higher than the price it has estimated for the contract, or if the lowest tender price includes some reservations, it has the right to negotiate with tenderers to reduce their prices or to change their reservations. The Purchasing Law specifies certain circumstances where the Evaluation Committee may negotiate with tenderers after opening their tenders. As a general rule, the Evaluation Committee is not allowed to negotiate any tender which does not conform to the conditions and specifications in the contract documentation.<sup>51</sup>

These circumstances are: <sup>52</sup>

- a. When the price quoted in the tender is higher than that prevailing in the market.

If the Evaluation Committee notices that the tender prices are very much higher than the market price, it should negotiate with the tendering submitting the lowest tenderer to further reduce his price. If he is unwilling to reduce it to a reasonable level, the Committee may negotiate with the tenderer submitting the next lowest tender price. The Evaluation Committee is under obligation to treat each tenderer equally. Thus, if it requests one tenderer to reduce his tender price by a specific percentage, other tenderers must be requested to reduce their tender price by the same percentage.

- b. If the tender contains one or more reservations.<sup>53</sup>

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The main function of the Opening Committee is to review all tenders received and check all prices and tender conditions and then report them to the Evaluation Committee.

<sup>51</sup> Circular no. 17/ 14300 dated 25 / 7 / 1400 AH (1980).

<sup>52</sup> Purchasing Law, *supra* n. 10, Art. 5 (d).



It is normal practice for tenderers to include in their tenders one or more reservations against a contract condition or specifications. For example, when a contracting authority invites tenderers to build a laboratory for the Ministry of Health, one tenderer may raise an objection against the specifications, because they are outdated, new specifications have been developed, and the Ministry will benefit from them. In negotiation procedures, a contracting authority may negotiate with this tenderer if his tender is the lowest price or the most economically advantageous in order to remove his reservation, alter, or accept it. Under Saudi practice, the Evaluation Committee should start negotiating with the tenderer submitting the lowest price if it decides to select him as a contractor, provided his tender contains no reservation. If the negotiation fails, the Evaluation Committee may negotiate with the tenderer submitting the next lowest tender. If the Committee fails to reach agreement with tenderers, it may cancel the present process and start a new tendering process.<sup>54</sup>

When one surveys the provisions of the Purchasing Law and its Implementing Regulations, it is noted that price is the most important factor in such regulations. A glance at the evaluation regulations conveys the impression that the Evaluation Committee is empowered to apply only the lowest tender principle. The following examples support this impression. Article 5 (d) of the Purchasing Law obliges the Evaluation Committee to "negotiate with the tenderer submitting the lowest tender price".<sup>55</sup> Moreover,

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<sup>53</sup> Purchasing Law, *supra* n. 10, Art. 5 (d)(2).

<sup>54</sup> Case no. 55 / T / 1 dated 1413 AH (1993).

<sup>55</sup> Purchasing Law, *supra* n. 10, Art. 5(d).

Article 17 of the Implementing Regulations requires the Committee to be guided by the local or external prices which have prevailed in previous dealings, and by the current market price.<sup>56</sup> Further, the Education Ministry has asked the Finance Ministry to evaluate the five lowest tender prices only if too many tenders have been received. The Finance Ministry considers such a request permissible since it does not contradict the general rules.<sup>57</sup> A final example which demonstrates the contracting authority's reliance on the lowest tender price as the main award procedure is a litigation case. The City Council of Riyadh invited tenderers to clean and maintain Riyadh City for a year. Fourteen tenderers submitted their tenders, three of whom were specialists in city cleaning. The others were not but undertook general maintenance activities, such the maintenance of government buildings. Instead of selecting a tenderer specialising in the city cleaning, the Evaluation Committee selected the lowest tender price from a tenderer who was not a specialist in cleaning cities.<sup>58</sup> Other tenderers, classified specialist in city cleaning, complained that the City Council of Riyadh had not followed tendering procedures under the Purchasing Law which requires such a contract to be awarded to a specialist contractor. However, the plaintiff lost the case on the grounds that the public authority had not violated

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<sup>56</sup> Implementing Regulations, *supra* n. 1, Art. 17.

<sup>57</sup> Education Ministry letter no. 114/34/1560/51 dated 3/9/1400 AH (1980) and the Finance Ministry letter no. 17/17997 dated 11/9/1400 AH (1980). However, excluding other tender prices because the public agency has received a huge number of tenders is not fair practice. It discriminates in favour of the five lowest tenders. If we view this action as justifiable then there is no need to call tenderers to participate in an open tendering procedure. If the public authority has received a huge number of tenders it should establish more than one opening and evaluation committee in order to help open and examine them, rather than exclude other tenders without any legal justification.

<sup>58</sup> Case no. 920/1/K dated 1418.

requirements under the Purchasing Law since it has the right to contract with a contractor who will satisfy its requirements.

When analysing the ways in which regulations are interpreted, it seems that evaluation procedures under the Purchasing Law on almost every occasion do not take into account any technical factors, only the price. In fact, there are many factors that should be considered when evaluating received tenders, primarily the nature of the contract and the needs of the society, to ensure projects and works are not assessed on price only. For example, it is short-sighted to evaluate a service contract merely on the basis of the lowest price since the service should be evaluated in accordance with the experience, classification, and previous performance of the contractor.

The lowest price procedure is used in highly sophisticated projects. Notwithstanding the fact that the most economically advantageous approach guarantees a higher degree of quality and professional work, as mentioned in the next sections, the Evaluation Committee gives the objective criteria, the technical suitability and financial ability of tenderers, less attention than is given to the difference between prices. As a result, selection from among the lowest tender price may lead the Evaluation Committee to exclude one or several economically advantageous tenders.

## 2. The award criteria under UK procurement contract regulations

There are two basic criteria for the award of a procurement contract:

- a. "The lowest price; and
- b. The most economically advantageous tender".<sup>59</sup>

The contracting authority is empowered to choose one of the above award criteria. The regulations do not specify conditions for using each approach, except that the public authority must publicise in the contract documents or in the contract notice which approach it will select. Both approaches have advantages and disadvantages.

The contracting authority is under an obligation to state in the contract documents or in the tender notice the criteria which it intends to apply to award the contract.<sup>60</sup> The ECJ supports this regulation. It held that ... "in order to ensure that a contract is awarded on the basis of criteria known to all the tenderers before the preparation of the tender, a contracting entity can take into account variants as award criteria only insofar as it expressly mentions them as such in the contract documents or in the tender notice".<sup>61</sup> The ECJ made clear in this case that the procurement law governs not just the forms of the procedure but also imposes obligations as to the manner in which the tendering process should proceed. The public authority cannot introduce new award procedures without cancelling existing procedures and informing tenderers of proposed changes. If the public authority fails to inform all tenderers of proposal changes, the new award procedure will discriminate in

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<sup>59</sup> Works Regulations, Art. 20 (1)(a) & (b), Supply Regulations, Art. 21 (1)(a) & (b), and Services Regulations, Art. 21 (1)(a) & (b).

<sup>60</sup> Works Regulations, Art. 20(2), Supply Regulations, Art. 21(2), and Services Regulations, Art. 21(2).

<sup>61</sup> *Case C- 87/94, Commission v. Belgium (the Walloon Buses)*, [1996], ECR, I-2043, at para. 89.

favour of some tenderers because tenderers unaware of the new award procedure will submit their price according to the information they had received in the original tender notice. If the contracting authority amends information in the tender document and only informs one or a few tenderers of the amendment, it is clear these tenderers enjoy an advantage over other tenderers, which breaches the equal treatment principle. Also, changing the award procedures from those the contracting authority published in the tender notice may necessitate the authority changing the contract specifications. If a new award procedure is not notified, tenderers will send their prices based on two different specifications which will breach the tender publication regulations and also negate the principle of equal treatment. Accordingly, the Advocate-General emphasised that the authority must respect the equal treatment principle, stating ...“a unilateral departure, in favour of one tenderer, from a public contracting entity’s requirements set out in the contract documents, constitutes a breach of the principle of equal treatment.”<sup>62</sup>

Where a contracting authority decides to abandon an award procedure in respect of which a contract notice has already been published, it is required to send a written document to tenderers and the Official Journal within 15 days, stating the reasons why it has not proceeded with the publicised procedures.<sup>63</sup>

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<sup>62</sup> *Ibid*, para. 60.

<sup>63</sup> Works Regulations, Art. 23(1), Supply Regulations, Art. 23(1), and Services Regulations, Art.23(1).

**a. The lowest price**

In this method, the award criterion is the lowest tender price. The tenderer who submits the lowest price has the right to be awarded the contract. "Subject to the suitability of tenderers, the contracting entities do not set any qualitative criteria and do not rely on any factors other than the price quoted to complete the contract offered".<sup>64</sup> However, it follows that the lowest tender should meet the requirements set out in the tender document and its quality considered acceptable.

There are, however, two exceptions to awarding the contract to the tenderer submitting the lowest price: first, in the case of an incapable tenderer, and second, in that of an abnormally low tender.

- (i) If the Evaluation Committee realises that the tenderer submitting lowest tender price will be unable to perform the contract, it has the right to turn its attention to the tenderer submitting the second lowest price to check his ability to perform the contract. The Evaluation Committee is required to investigate the technical and financial ability of the tenderer and decide if he is able to perform the contract. Awarding the contract to the tenderer submitting second lowest price must be justified. The contracting authority is obliged to inform any tenderer of the reason why he has

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<sup>64</sup> P. Trepte, *Public Procurement in the EC* (Oxfordshire, CCH Editions Limited, 1993), p.161.

been unsuccessful.<sup>65</sup> If he believes that the decision of the public authority is unjustified, he may challenge it.

- (ii) The contracting authority has the right to accept or reject an abnormally low tender.<sup>66</sup>

The regulations do not define nor set out criteria to distinguish the abnormally low tender. The contracting authority will not award the contract to a seeming exceptionally low tenderer, but to a tenderer whose price is below or close to the estimated contract price nominated in advance by the public agency. Therefore, the Evaluation Committee is given the power to decide what to do with abnormally low tenders. If it decides to accept an abnormally low tender, the Evaluation Committee must first examine the tender's details before deciding to award the contract. The "objective criteria"<sup>67</sup> must be taken into account during such Evaluation. The Committee is responsible for investigating the technical suitability, financial capacity, profitability and previous performance of the tenderer. It is also required to check his ability to continue to perform the contract if the Committee decides to award him the contract. "Such an Evaluation may reveal that the offer is in fact the most favourable and there does not appear to be a risk of

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<sup>65</sup> The Public Contract (Works, Services, and Supply, Amendment Regulations 2000), Art. 23(2).

<sup>66</sup> Works Regulations, Art. 20(6), Supply Regulations, Art. 21(7), and Services Regulations, Art.21(7).

<sup>67</sup> Technical ability, and financial stability, mentioned above pp. 209-211.

default".<sup>68</sup> Hence, the Evaluation Committee may not prevent tenderers from being awarded contracts because their tenders are abnormally low if the Evaluation results show they are fully capable of performing the contract. The regulations do not oblige the Evaluation Committee to justify its decision to award a contract to a tenderer submitting an abnormally low tender.

If the Evaluation Committee, on the other hand, decides to reject an abnormally low tender, it must comply with certain legal requirements. In this respect, it must justify its rejection of such tender.<sup>69</sup>

Reasons for participating in the procurement market differ from one tenderer to another and different strategies may be followed in order to win the contract. A tenderer, for example, may offer a low price in order to enter the foreign procurement market.<sup>70</sup> On the other hand, a tenderer may submit an abnormally low tender in order to dump his product in the procurement market.

He will be given the opportunity to explain his tender and his ability to perform. The explanation must be taken into account before awarding the contract. Thus, in one case, the

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<sup>68</sup> S. Arrowsmith, *supra* n. 36, p.245.

<sup>69</sup> *Case 103/88, Fratelli Costozo SPA v. Comune di Milano*, [1989] ECR 1839, at 1854.

<sup>70</sup> South Korean contractors won many procurement contracts in the Saudi market during the 1970s because they submitted abnormally low tenders. They justified this policy on the grounds that their government encouraged them to enter the Saudi market. In fact, it promised to compensate them for any loss of profits. In this regard see C. Moon, Korean Contractors in Saudi Arabia: Their Rise and Fall, *The Middle East Journal*, Vol. 40, No. 4, Autumn 1989, p. 614.



ECJ rejected Luxemburg's argument for rejecting a tender because it had not sought an explanation of the tender from the tenderer.<sup>71</sup>

In contrast, an explanation requirement is unknown under Saudi Purchasing Law. If the authority decides to reject a tender, it is not required to explain why. However, its decision is actionable and any tenderer has the right to challenge such decision to the Board.

**b. The most economically advantageous tender**

In this type of tendering procedure the contracting authority evaluates the price together with technical and financial criteria stated in the contract documentation.

Usually, the contracting authority selects this type of award for highly sophisticated projects which comprise complex technical specifications.

One can infer from the language of the regulations that the list of criteria which may be used to determine the tenderer's financial and economic standing is not exhaustive. The contracting authority may stipulate criteria other than those expressly stated in the regulations in order to meet public interest and to remain adoptable to any future development in the procurement market.

The most economically advantageous tender approach relies on checking the technical ability and financial stability of tenderers. The

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<sup>71</sup> *Case 76/81, S.A. Transporoute v. Ministry of Public Works (Transporoute)*, ECR, 417.

Evaluation Committee is under obligation to ensure that the tenderer meets at least minimum financial stability standards and is able to perform the work. In addition, it should explore the development of the firm, i.e. to what extent it employs up-to-date technology. If more than one tender meets all three previously mentioned requirements, the Evaluation Committee may rely on other factors in order to distinguish the more favourable tender. Some private firms have a research unit to help them to develop their management and performance skills and apply the newest theories in the business and engineering markets, whereas other firms do not try to develop themselves, but follow a similar performance plan in each procurement contract. If the Evaluation Committee takes this factor into account, it will help to ensure the contracting authority contracts with the most experienced contractor and force other contractors to develop their firms in order to better compete in the market. Therefore, before selecting a contractor, the Evaluation Committee should "rely on the professional opinion of an expert consultant for the purpose of assessing which tenderer best satisfies the authority stated award criteria".<sup>72</sup>

## **B. Termination of Tendering Process**

The public authority may decide to terminate the tendering procedures for several reasons. For example, if the authority decides it is in the public interest not to issue the contract, or it no longer needs the goods or services, the Evaluation Committee discovers that the specifications contain major

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<sup>72</sup> A. Brown, Award Criteria under the EC Procurement Directives: a Note on the *SIAC Construction Case*, (2002) 11 *Public Procurement Law Review*, issue 2, p. NA 29.

mistakes, the government changes its procurement regulations, prices received are very much higher than the estimated price and tenderers refuse to reduce their prices, and funding is lacking. In brief, there are many reasons the contracting authority may rely on to terminate the tendering process. The Evaluation Committee may recommend termination of the process because tenderers are not qualified to perform the work, or the standard of their previous work is not considered satisfactory. In this context, the authority may decide to terminate the award process, either before or after the opening of envelopes. Termination of the tendering process will be analysed separately under Saudi Purchasing Law and UK procurement regulations.

**a. Termination of the tendering process under Saudi Purchasing Law**

The Purchasing Law states that "tenders may be cancelled when the need ceases or when it is revealed to the Committee that price, terms or specifications are not suitable and the tendering process is unlikely to achieve any results if negotiations fail".<sup>73</sup>

In fact, there is a distinction between the termination process before and after the opening of envelopes. In the former case, the public authority may reject the tendering process without opening the envelopes, relies on reasons not related to price to do so. External reasons may also encourage the authority to decide upon termination. If it, for example, discovers that the specifications contain major mistakes, or if the government changes its procurement regulations, or the authority cannot provide sufficient funds for such a contract. Most of these reasons are related to the public interest.

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<sup>73</sup> Purchasing Law, *supra* n. 10, Art. 5(e).

However, the public interest has a wide meaning, and the authority may reject the tendering process in of the public interest without a good reason. Therefore, it is recommended that the Purchasing Law provides some limitations and guidelines for use of such term.

If terminating the process before the opening of envelopes, the public authority is under two obligations: first, it must return the security bond to all tenderers.<sup>74</sup> Second, it must publish its reasons for termination in the *Official Gazette*. It should be noted that the Purchasing Law does not specify a time within which to publish the reason(s) for termination. Accordingly, it is submitted that an analogy is made to the thirty day period cited in article 5(a) of the Purchasing Law within which contractors can submit their tenders to participate in procurement competition. A similar period is recommended within which the contracting authority should publish reasons for terminating the tendering process.

If tender prices are too high, or if every tender contains reservations and the Evaluation Committee fails to eliminate them or if it is tenderers' intention to dump certain products on the market, the contracting authority has the right to terminate the tendering process. However, it is, as mentioned previously, under an obligation to provide a good reason for such termination.

There are two conditions regulating the return of the security bond to the tenderers:

- (i) The authority is under an obligation to return the security bond if the reason for terminating the tendering process

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<sup>74</sup> Purchasing Law, *supra* n. 10, Art. 5(f).

is related to the public interest. In this case, the tenderer must submit a written request for return of such bond.<sup>75</sup>

- (ii) The contracting authority has the option to return or not return the security bond if the tenderer requests return of his bond after all tenders have been opened.

Another issue arises in that tenderers usually incur some expenses before submitting their tenders. If the tendering process is terminated they will not recoup such expenses, therefore, it is suggested that if termination is due to, for example, to the authority changing procurement policy, in the public interest, or change in government, the authority should compensate tenderers for any expenses incurred in the preparation of their tenders.

#### **b. Termination of the tendering process under UK regulations**

Unlike the Purchasing Law, UK procurement regulations do not distinguish between termination before and after the opening of tenders. The regulations empower the public authority to terminate the tendering process before or after the opening process if it decides on such termination.

Sometimes the public authority has no option but to terminate the tendering procedure, particularly if it has received no tenders in open or restricted procedures.<sup>76</sup> Its only obligation in this circumstance is to inform the Official Journal of this decision. Article 22 (4) of the Works regulations states: "where a contracting authority decides not to award a public works

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<sup>75</sup> Finance Ministry letter no. 17 / 18580 dated 22 / 10 / 1404 AH (1984).

<sup>76</sup> Works Regulations, Art. 10(2)(d), Supply Regulations, Art. 10(2)(b), and Services Regulations, Art. 10 (2)(b).

contract...it shall inform the Official Journal of that decision...".<sup>77</sup> In contrast, the GPA is more specific in this matter than UK procurement regulations. It authorises the procuring entity to terminate the award procedures only in the public interest. It is stated: "unless in the public interest an entity decides not to issue the contract, the entity shall make award to the tenderer who has been determined to be fully capable of undertaking the contract...".<sup>78</sup> However, the GPA Code does not define the meaning of the phrase "public interest" nor sets any criteria to determine it. Therefore, the procuring entity may use any termination reason under the wide meaning of "public interest", which may affect the rights of the tenderer.

Article 22 requires the contracting authority to publicise its reasons in the Official Journal.<sup>79</sup> Such Article does not suggest a time within which reasons should be published. However, Arrowsmith suggested a maximum 48 days as analogous with the time limit applying under the regulations governing the publication of award notices (48 days).<sup>80</sup>

In contrast to the Purchasing Law, UK procurement regulations lack information regarding the tender bond. By analogy with the return of the security bond to unsuccessful tenderers, the authority should return the tender bond to tenderers after publication of the termination decision, especially if the termination has been made for reasons not related to tenderers.

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<sup>77</sup> Works Regulations, Art. 22 (4).

<sup>78</sup> GPA, *supra* n. 18, Art. XIII (4)(b).

<sup>79</sup> Works Regulations, Art. 22 (4), Supply Regulations, 23 (4), Services Regulations, 23 (4).

<sup>80</sup> S. Arrowsmith, *supra* n. 49, p. 255.

### **III. Awarding the Contract**

The awarding of the contract is the final step in the tendering process, and the parties to the contract have different rights and obligations. It transfers the tenderers and the contracting authority from the stage of the competition to win the contract to the stage of performing the contract. Previous tendering procedures are primarily steps towards selecting a successful tenderer to perform contract work and deal with the qualifications of tenderers, their tender prices and ability to carry out the contract. Once the Evaluation Committee selects a contractor, there is no need to address any of his qualifications, only his ability to perform the specifications and terms and conditions of the contract. The contracting authority in the contracting stage will control the contractor's performance and ability to comply with the specifications of the contract as explained in chapter three.

The awarding of the contract will be analysed separately under Saudi Purchasing Law and UK procurement regulations.

#### **A. The awarding of the contract under the Purchasing Law**

Once the Evaluation Committee has evaluated all tenders and has decided to continue the tendering process, it should select a successful tenderer to perform the contract and send its recommendation to the contracting authority in order for the head of the public agency to authorise the procurement contract. In practice, it is usual not to have a written contract if the procurement amount is less than SR 100,000 (£16,000).<sup>81</sup> It is usual to obtain oral agreement in this case. As a general rule, procurement

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<sup>81</sup> Implementing Regulations, *supra* n. 1, Art. 27.

contracts must be written if the sum of the contract is more than SR 100,000 (£16,000). However, the Board held that the contractor has the right to be paid in the case of the public agency ordering him to perform procurement work and there has been no written procurement contract, and the price of the procurement work is in excess of SR 100,000.<sup>82</sup>

The contracting authority is required to send a notice of acceptance to the successful tenderer<sup>83</sup> and he should submit a performance bond no less than 5 % of the contract amount.<sup>84</sup>

Public agencies are required to send a copy of their procurement contracts to the General Audit Office if the contract sum is more than SR 50,000 (£8,000).<sup>85</sup> It is worth mentioning that several Royal Orders emphasise that Arabic must be the language used in procurement contracts<sup>86</sup> and contracting authorities are requested to use the Islamic calendar<sup>87</sup> as the main calendar when dealing with private contractors.<sup>88</sup>

Unlike UK regulations, the Purchasing Law does not request the contracting authority to publish the name of the contractor in the *Official Gazette*. In addition, the Purchasing Law does not specify a particular period within which performance of the contract should commence. Accordingly, once the Evaluation Committee selects a successful contractor, it does not inform him as to when to start to execute the contract, nor inform him as to

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<sup>82</sup> Case no. 250 / T / 1 dated 1410 AH (1980).

<sup>83</sup> Implementing Regulations, *supra* n. 1, Art. 27.

<sup>84</sup> Purchasing Law, *supra* n. 10, Art. 7(a).

<sup>85</sup> Circular no. 12/7927 dated 2/5/1998 AH (1979).

<sup>86</sup> Royal Order no. 3/H/15351 dated 1400 AH (1980), 3/H/9574 dated 1401 (1981) and 3/H/8881 dated 1401 (1981).

<sup>87</sup> The Islamic calendar is explained in Ch. 1, section C, footnote no. 3.

<sup>88</sup> Royal Order no. 7/H/1657 dated 1403 AH (1983).



when he should commence such performance. Moreover, unsuccessful tenderers should be informed of why they lost the competition. The Purchasing Law does not give them the right to be informed of nor request the contracting authority to publish the reason for selecting the successful contractor. It is submitted that unsuccessful tenderers have the right to know why they lost the competition in order to prepare themselves well in future competitions.

### **B. The awarding of the contract under UK regulations**

If the Evaluation Committee decides to continue the tendering process, it should send a report to the authority advising it to contract with the tenderer presenting the most suitable tender. The contracting authority is subsequently required to promptly inform, in writing, the contractor who has been awarded the contract so that he may start executing it. Under UK regulations, the contracting authority should also publish a notice in the *Official Journal* within 48 days<sup>89</sup> after the awarding of the contract, identifying the name of the successful contractor and the date of the award. In addition, the Evaluation Committee is obliged to prepare a permanent record of each procurement project or work.<sup>90</sup> It is also under obligation, within 15 days of the date from which it receives a request in writing from an unsuccessful tenderer, "to explain why he was unsuccessful".<sup>91</sup> A written explanation should be sent to the unsuccessful tenderer explaining the reason for his

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<sup>89</sup> Works Regulations, Art. 21(1), Supply Regulations, Art. 22(1), and Services Regulations, Art.22(1).

<sup>90</sup> The Public Contract (Works, Services, and Supply, Amendment Regulations 2000), Art. 23 (4).

<sup>91</sup> *Ibid*, Art. 23 (2).

failed tender. It is submitted that this should be extended to every unsuccessful tenderer in order to help develop his performance and ability. Each unsuccessful tenderer should be given the opportunity to discuss his tender with the authority in order to avoid weakness in a future tender. In the long term, this procedure would also help the procurement sector develop and create genuine competition between similarly qualified tenderers. At present, the Purchasing Law does not provide for an unsuccessful tenderer to be given an explanation for the rejection of his tender.

A successful tenderer must provide a performance bond before executing the contract. If he does not submit 10 % of the contract price, the authority has the right either to forfeit the security bond or to contract with a second tenderer and force the original contractor to pay the difference between the original price and the price of the second tender.

#### **IV. A comparative analysis**

In addition to the comparative analysis of Saudi and UK procurement systems which has been provided throughout this chapter, this section will focus on similarities and differences when exploring the evaluation of tenders and the awarding of the contract under the two procurement contract regulations.

It has been mentioned in part I of this chapter that the basis of the evaluation procedures differs under the two systems. Tenderers who participate in the UK procurement market have the right to be informed of the criteria used for evaluating tenders before they submit them. In contrast, the

Purchasing Law does not include a regulation requiring the contracting authority to indicate how tenders will be evaluated before inviting tenderers to participate in procurement opportunity. Tenderers should have the right to informed of whether tenders will be evaluated on the lowest price or most economically advantageous criterion in order to prepare their tenders on this basis. Such omission identifies an urgent need to reform Saudi Purchasing Law. UK procurement contract regulations provide guidance for reform of Saudi procurement regulations.

The qualification system can be used to check the ability of the contractor to perform the contract until completion. The qualification process is usually divided into two aspects: the technical ability and financial suitability of tenderers. The analysis above has shown that the qualification processes differs in the two procurement systems. UK procurement contract regulations make it clear that there are two types of qualification systems: technical and financial. In addition to general requirements which tenderers must satisfy to become qualified, such as registration on the recognised lists of contractors, each system has its own requirements, aforementioned, in order for the tenderer to prove his technical ability and financial suitability to carry out the work. The Purchasing Law, in contrast, requires the Evaluation Committee to take into account the contractor's technical ability and financial suitability without providing any basic guidance to distinguish qualification requirements in order to apply them on an equal basis in the case of every contractor. In practice, in the absence of a central evaluation committee, tenderers may be treated differently. Chapter four indicated that all tenderers have the right to

be treated equally, but if each public agency has its own evaluation committee, each committee may create its own qualification, requirements which may differ from one public agency to another. Stating qualification requirements in procurement regulations, as in the case in the UK procurement contract regulations will eliminate discrimination in favour or against a particular tenderer and each tender will be treated equally by all public agencies.

The two procurement systems adopt similar requirements to regulate tenders not complying with specifications. In general, the contracting authority is required to reject any tender not complying with the contract's specifications.

Another difference between the two procurement systems is that the UK regulations require firms' registration on the recognised list of qualified firms. Such registration is one method of proving contractors' qualification. Saudi Purchasing Law, in contrast, does not include any requirement to establish a similar list. Some public agencies have a voluntary list and encourage contractors to register their names on it, not to confirm their qualifications but to assist the agency in contacting them if it wants to invite them to procure. A recognised list of qualified firms has many advantages which the contracting authority should benefit from. It assists the contracting authority to distinguish between contractors on financial and technical grounds which may force contractors to develop their technical and financial capability in order to remain registered on such list.

The analysis of award criteria shows that Saudi Purchasing Law adopts only one award criterion, the lowest price, while UK procurement contract regulations adopt two methods to award a procurement contract: the lowest price and the most economically advantageous tender. During the evaluation of tenders, the Saudi Purchasing Law gives technical and financial factors less attention and concentrates on the price as the main factor. Accordingly, it uses the lowest price method in both simple and highly sophisticated projects. The negative impact of this policy appears in the poor quality of the work performed, as indicated in the Board cases cited above, and the likelihood of ignoring most economically advantageous tenders in order to save money or to select the lowest tender.

Although the UK regulations do not specify any particular condition guide contracting authorities to use either one or the other, contracting authorities are under responsibility to state in the contract documents or the tender notice the criterion which it intends to apply to award the contract.

Another difference between the two procurement systems is used of the lowest price tender to carry out highly sophisticated projects which comprise complex technical specifications under the purchasing law, while such sophisticated projects are performed through the most economically advantageous tender under the UK regulations.

The two procurement systems have similar rules governing termination of the tendering process. They allow contracting authorities to terminate tendering procedures if they no longer need the goods or services or in the public interest. The two systems do not clarify the meaning of 'the public

interest' and leave its interpretation to the discretion of the authorities. The impact of termination differs in the two systems. Under the Purchasing Law, the contracting authority's required to return the security deposit tenderers are obliged to provide with their tenders. UK regulations, in contrast, require the contracting authority to publish its reasons for terminating the tendering process in the *Official Journal*. The Purchasing Law does not require such publication in the *Official Gazette* and tenderers do not possess the right to be informed as to why the authority has terminated the tendering process. The latter lack points to the need for greater transparency in the Saudi procurement systems.

## **Summary**

This chapter has explored the evaluation of tenders and awarding the contract under Saudi and UK procurement contract regulations.

Before selecting a successful tenderer, a contracting authority is responsible for checking the qualifications of all tenderers submitting tenders. Tenderers must be qualified in order to participate in procurement opportunities, if not, they may be excluded from the competition. General principles which regulate the qualification systems are similar under the two procurement system.

After evaluating all tenders received, contracting authorities under the two procurement systems can either terminate the tendering process in the public interest if they decide that the competition is no longer of benefit, or can award the contract to the contractor submitting the most suitable tender.

The two procurement systems adopt similar rules for evaluation procedures. Contracting authorities award the contract to the contractor submitting the lowest price tender or the most economically advantageous tender. However, there is a difference between the two procurement systems. While UK regulations provide for two award criteria, the Purchasing Law specifies the lowest price as the main criterion for selecting a successful tenderer. Adopting the lowest price as the main criterion for selecting the contractor might lead the contracting authority to ignore the quality of work and concentrate on how money might be saved. This practice should be subjected to in-depth study and analysis by the Saudi Finance Ministry, the General Auditing Agency and other public agencies, in order to promote efficient and effective procurement activity.

The findings in this chapter demonstrate that award procedures under Saudi Purchasing Law are in need of reform to benefit the society. There is a need to develop the publication process in order to inform unsuccessful tenderers the reasons for their failure and to publish reasons for terminating the tendering process if the contracting authority decides not to continue it.

Having explored the preparation, receipt and evaluation of tenders in Chapters Five and Six, the next chapter will investigate the rights of sub-contractors in procurement contracts under Saudi and UK procurement regulations. Sub-contract requirements which the main contractor or contracting authority should follow to sub-let part of the main contract, when the main contractor can assign whole or part of his contract, and how sub-

contractors are selected under the two procurement systems, are some of the issues that will be discussed in detail in Chapter Seven.



# Chapter Seven

## Rights of Sub-contractors

## **Chapter Seven: Rights of Sub-contractors**

### **Preamble**

Previous chapters have dealt with the rights of the main contractor in procurement contracts. In fact, most procurement contracts, particularly public works and concession contracts, are performed not only through the main contractor but also with the assistance of sub-contractors. In some contracts, large contracts in particular, the main contractor needs, sometimes, to hire more than one sub-contractor. Therefore, it is important to shed light on the rights of sub-contractors in procurement contracts.

Generally, the main contractor is required personally to perform his contract. However, procurement commonly contracts contain provisions which allow the main contractor to sub-contract part of his contract, and some allow execution of highly sophisticated elements of the main contract by a specialist contractor. Use of sub-contractors differs from one country to another. Some countries use sub-contracting as a political tool to benefit their domestic contractors by requiring foreign contractors to sub-contract part of their procurement contract to local contractors. The government's aim is to train domestic contractors by enabling them to benefit from high technology and modern performance procedures employed by foreign contractors, especially in large and complex public works and construction projects. Under Saudi practice, for example, many domestic contractors benefited when they

worked as sub-contractors during the King Saud University project <sup>1</sup> (1979-1985).

In practice, subcontracted work is often of a specialist nature, requiring special equipment and skilled labour. Sub-contracting, traditionally, has been used in construction and building contracts to carry out specialist operations, but its use has increased, in most countries, in varying types of procurement contracts.

Sub-contracts are sometimes in written form when procurement regulations require this, and sometimes made orally when the value of the contract does not reach a certain price for example, £60,000 under Saudi regulations. However, the latter type of contract may give rise to problems, since the contractor terms rest on word of mouth agreement only and nothing is stated in writing. In practice, almost all sub-contracts under UK regulations are in written form. In fact, the Joint Contracts Tribunal<sup>2</sup> (JCT) has published many standard forms of sub-contract, such as ICE<sup>3</sup> forms of sub-contract for use in civil engineering projects, and the Government Form GC/Works/1, which is used for both building and civil engineering projects by public agencies. There are also many standard forms for nominated sub-contracts, which will be explained later, most notably the NSC/1 tender form, the NSC/2,

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<sup>1</sup> In 1979, the Saudi government contracted with a consortium of American, French and English firms to build King Saud University. The price of the contract exceeded 2 billion Stirling Pounds and the work was completed in 1985.

<sup>2</sup> The most commonly known standard forms of building contract are issued by the Joint Contracts Tribunal, a body responsible for producing and reviewing standard forms of building contract. The first standard form issued by the JCT was in 1963. This thesis will concentrate on JCT 80 and JCT 98 standard forms.

<sup>3</sup> ICE Design and Construct Conditions of Contract issued by the Institution of Civil Engineers.

which regulates the employer and sub-contractor agreement, and the NSC/N which includes nomination instructions.

In contrast, neither the Saudi Purchasing Law nor its other procurement regulations contain any provision regarding the formality of the sub-contract. This lack of regulation has opened the door to different forms of sub-contracts which has resulted in many claims and disputes between contract parties.

In general, one should note that almost all of the regulations of sub-contracting under UK regulations are provided or mentioned in the building or construction forms of contract. However, the author notes that the main procurement regulations, such as Public Works, Supply and Services, have no provisions regarding sub-contracting. Only building or construction contracts regulations deal with sub-contracting. This is a lack which should be taken into consideration, especially when the contracting authority has the power to nominate sub-contractors and invites them to send their tenders during the tendering stage of the main contract. In order to protect their rights and main contractors' rights, this omission should be rectified and lawmakers should include main procurement regulation provisions regarding sub-contracting.

This chapter will be divided into three parts in order to investigate the rights of sub-contractors under Saudi and UK procurement regulations. It will firstly consider the requirements of the sub-contract, which the main contractor or contracting authority should follow to sub-let part of the main contract. Then it will review the assignment of the main contract, explaining

when the main contractor can assign the whole or part of his contract in general and the assignment of the financial rights of the main contractor. The third part will explain how sub-contractors are selected under the two procurement systems. The second part of the chapter will examine the obligations of parties during the performance and after the completion of works in the sub-contract. Finally, the last part of the chapter will undertake a comparative analysis of sub-contracting regulations under the two procurement systems, highlighting similarities and differences, and propose recommendations to develop the sub-contracting approach under Saudi procurement regulations.

## **I. Sub-contract Requirements**

In order for the main contractor to assign part of his contract and hire a sub-contractor, he must obtain prior consent from the contracting authority to sub-let part of his contract. Assignment and prior approval regulations will be analysed below.

### **A. Prior consent**

The cornerstone of sub-contracting work under the two procurement systems, Saudi and UK, is the permission of the public authority. The main contractor is required to obtain written consent to hire a sub-contractor from the public authority. If the main contractor sub-contracts without such permission, the contract is null and void.

Under Saudi practice, if the contracting authority is asked by a main contractor for its consent to it hiring a sub-contractor, it should reply in a reasonable time otherwise it could be at fault.<sup>4</sup> If the contracting authority refuses its consent, it should justify its refusal. However, neither the Purchasing Law nor Board judgements provide any legal action against its refusal of consent.

Prior consent from the contracting authority is stipulated in order to guarantee the quality of the work executed by sub-contractors.<sup>5</sup> In general, the contracting authority follows tendering procedures to ensure it contracts with a qualified contractor who should perform the contract in a highly professional way. Therefore, sub-contractors' performance should be of the same quality, which necessitate the authority checking their ability to perform before allowing them to commence such performance. Thus, choosing a cheap sub-contractor may damage or at least affect the performance of other parts of the main contract. As a result, Saudi and UK systems give the contracting authority the power to accept or reject sub-contractors in order to encourage the main contractor to select a qualified sub-contractor.

A question may be raised: should the public authority be informed of the terms and conditions of a sub-contract before it is signed? To answer this question the two procurement systems' regulations need to be distinguished.

**First,** Saudi procurement regulations are ambiguous in this matter. They do not clarify this point. One can find no regulation or circular requiring

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<sup>4</sup> Case no. 334 /3 / K dated 1406 AH (1986).

<sup>5</sup> F. Chaix, the Right of Recourse of an Employer against a sub-contractor, [1998], *The International Construction Law Review*, pt.2, p. 218.

the contracting authority's review of a sub-contract before it is signed. This is because the regulations give sub-contracting little attention. The only restriction in this matter is to require the main contractor to obtain prior consent before hiring a sub-contractor.

**Second,** UK regulations differ concerning informing the contracting authority about the terms and conditions of a sub-contract according to two types of sub-contracting: nomination and non-nomination procedures. In nomination procedures, the contracting authority treats sub-contractors like the main contractor in tendering procedures. In other words, sub-contractors are required to submit their tenders to the contracting authority during the tendering stage of the main contract. Therefore, the contracting authority has jurisdiction to evaluate sub-tenders and negotiate with sub-contractors during the period of the tendering stage of the main contract. Consequently, in nomination contracting procedures, the authority has the power to review the terms and conditions of a sub-contract and decide the rights and duties of a sub-contractor. In the other case, non-nomination procedures, the main contractor is responsible for selecting a sub-contractor. Such selection gives the main contractor power to negotiate and deal with sub-contractors. This means the rights and obligations of sub-contractors will be decided by the parties to a sub-contract without intervention from the public authority. UK regulations are unclear as to whether the contracting authority has the right to be informed about the terms and conditions of a sub-contract. Similar to

Saudi regulations, the employer's (contracting authority's) written consent to employ the selected sub-contractor is stipulated before dealing with him.<sup>6</sup>

It is submitted that a contracting authority should review the provisions of the sub-contract in order to protect the rights of the sub-contractor. Although there is no direct relationship between sub-contractors and the contracting authority, it is recommended that the authority be informed about the conditions of a sub-contract in order to change unfair terms if there are any, and to safeguard the performance and rights of sub-contractors. In fact, the contracting authority has no power to protect the rights of sub-contractors in the absence of a direct relationship between them. Consequently, it is recommended that the contracting authority advise sub-contractors about their rights and obligations when the original contractor refers the sub-contract to the contracting authority for approval.

The impact of hiring a sub-contractor without the consent of the contracting authority is the same in the two procurement systems. The main contractor will breach his contract if he deals with the sub-contractor without the permission of the contracting authority. The contracting authority has the power to apply the terms of the contract against the main contractor.<sup>7</sup> It may decide that the main contract is invalid and end it and re-contract at the expense of the main contractor.<sup>8</sup> Conversely, it may approve the decision of the main contractor and ratify the sub-contract.

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<sup>6</sup> JCT 98, Clause 19.1.1.

<sup>7</sup> I. Ndekurgu, *Sub-contractor control-the key to successful construction*, the Chartered Institute of Building, Technical Information Service no. 98, 1998, p.10.

<sup>8</sup> *Ibid*, p. 11.



Under Saudi practice, the Board held that the sub-contractor has no right to request the public agency for payment if the main contractor has not informed the public agency and obtained its approval prior to subcontracting.<sup>9</sup> In this regard, the Board defined the relationship between the parties in the subcontract. It held that the subcontractor does not contract with the public agency. Therefore, he has no right to sue the public agency if the main contractor does not pay him.<sup>10</sup>

The case is different under the UK system. If the contracting authority nominates a sub-contractor then the main contractor is responsible for paying him at the agreed time, otherwise the contracting authority will deduct the payment amount from the main contractor's bills and pay the sub-contractor.

It is recommended that the contracting authority treat the main contractor's decision to hire the sub-contractor without its prior consent as made in good faith<sup>11</sup> until proved contrary. The progress of the work of the main contract, monthly reports, and the quality of the work performed are indicators of the good or bad faith of the main contractor. In one case, the Board refused the contracting authority's argument that the main contractor had cheated because he had sub-let part of his contract without the approval of the contracting authority.<sup>12</sup>

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<sup>9</sup> Case no. 678 / T / 1 dated 1411 AH (1991).

<sup>10</sup> Case no. 222 / T / 1 dated 1413 AH (1993).

<sup>11</sup> A contract performed in good faith is one that has been honestly and faithfully completed to an agreed common purpose and is consistent with the justified expectations of the other party. See chapter one, section G, definitions, for more interpretation.

<sup>12</sup> Case no. 114 / 1 / K dated 1418 AH (1998), and Case no. 182 / 1 / K dated 1418 AH (1998).

**B. Assignment of the contract**

Assignment of the contract will be explored under Saudi and UK regulations in the following sections:

**1. Assignment of the contract under Saudi regulations:**

In general, the main contractor is required to perform his contract by himself, as contracted with the public authority. However, the nature of procurement contracts gives both the contractor and the public authority an opportunity to hire different contractors to assist performance of the main contract. For example, if the public authority has contracted to build a hospital and the contract contains many technical, electrical or medical specifications, these may require specialists to execute them. Therefore, procurement regulations allow the main contractor to assign part of his contract to a sub-contractor. A question which may be raised regarding this assignment is: does it cover all or part of the main contract? In other words, can the main contractor subcontract the whole of his contract? In order to answer this question one must distinguish between assignment and novation. In practice, there are two ways to withdraw all of the rights and obligations of the main contractor, novation or assigning part of his contractual obligations to one or more subcontractors. The main difference between novation and assignment relates to the relationship between the original parties of the contract, the main contractor and the public authority. Novation "amounts to the extinction of the obligation and the creation of a new one, rather than to

transfer of the obligation from one contractor to another”,<sup>13</sup> while assignment means assigning part of the main contract to another contractor. Both novation and assignment require the prior consent of the contracting authority. Novations occur frequently in building contracts, particularly where a company has become insolvent during the course of the project and the contract is completed by another contractor.<sup>14</sup>

It should be noted that Saudi procurement regulations do not apply the notion of novation. In practice, it is unusual for a public agency to transfer the whole contract to another contractor. However, under Article 12 of the Purchasing Law there is allowance for the transfer of all the rights and duties of the main contractor to a new contractor if the public authority has penalised him as a negligent contractor. When a contractor has breached his contractual obligations, the public authority must send him a letter warning him to comply with his obligations. If 15 days elapse without any change then the public authority has the power to rescind the existing contract and contract with another tenderer to continue performance of the work at the expense of the first contractor.<sup>15</sup>

The only practice permissible under Saudi Purchasing Law is assignment of part of the procurement contract.<sup>16</sup> Saudi Purchasing Law is complicated in this regard. Sometimes the procurement work does not require the main contractor to possess any personal qualifications or long experience

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<sup>13</sup> P. Atiyah, *“An Introduction to the Law of Contract”*, (Oxford, Clarendon Press, 5<sup>th</sup> Edition, 1995), p. 387.

<sup>14</sup> J. Price, *“Sub-contracting under the JCT Standard Forms of Building Contract”*, (Hampshire, Macmillan, 1997), p. 20.

<sup>15</sup> Purchasing Law, Royal Decree no: M / 14 dated 7 / 4 / 1397 AH (1977), Art. 29.

<sup>16</sup> Finance Ministry circular no. 17/ 42031 dated 5/11/1403 AH (1983).

in the work to be undertaken, which may allow the assigning of the whole contract to a sub-contractor to perform it. In fact, the procurement regulations close the door to the assignment of the whole contract, even if the public authority will benefit from such assignment, and allow the assignment of only part of the contract.

In practice, public agencies follow long and complicated tendering procedures to select the contractor to execute the work of the contract. Contractors' experience and financial and technical factors are taken into consideration during the evaluation procedures and before the decision is made to select the successful contractor. The personal qualifications and experience of the contractor's firm will have influenced the decision of the Evaluation Committee to give the contract to the selected contractor. Therefore, one can say that the main contractor has no right to withdraw himself, without an exceptional reason, from execution of the contract and contract with a sub-contractor or a new contractor to continue the performance on his behalf.

Consequently, Article 4 of the Saudi Public Works Contract prevents the main contractor from subcontracting his entire procurement contract.<sup>17</sup>

## 2. Assignment of the contract under UK regulations:

Similar to practice of under Saudi system, the assignment of the whole contract is prohibited under UK practice. Clause 19.1.1 of the JCT 98 prohibits

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<sup>17</sup> Public Works Standard, Council of Ministers' Decision no. 136, dated 13/ 6/1408 AH (1988), Art. 4.

such assignment.<sup>18</sup> Accordingly, a contractor can never assign his contractual obligations. However, he has the right to assign the benefits of a contract, for example, his financial rights. Thus, contractual obligation is a “personal obligation which cannot be sub-contracted out without it being a breach of contract”.<sup>19</sup>

In a building contract, for example, the whole contract may not be subcontracted if (i) the main contractor was chosen for qualities specific to him, e.g. his particular skills or knowledge, or (ii) the particular nature of the work, e.g. its specialist nature or possibly its magnitude.<sup>20</sup> Accordingly, if the main contractor was selected because of personal qualifications he has no right to withdraw from executing the main contract and bring in a new contractor to perform the entire contract on his behalf.

In the two procurement systems, it should be noted that before the assignment of any part of the contract, the main contractor is under obligation to abide by the general principles of procurement contracts.<sup>21</sup> Consequently, he must not contract with anyone precluded from contracting with the public authority, such as a prisoner, or government employee as mentioned in Chapter five. Also, he must not contract with procurement contractors who have previously been excluded from dealing with the public authority, either by the government or a court decision. For example, the public authority may have prohibited contracting with a particular contractor

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<sup>18</sup> JCT 98, clause 19.1.1.

<sup>19</sup> *Davies v. Collins*, [1945] 1 all 247.

<sup>20</sup> J. Powell, Subcontracting in the United Kingdom, *The International Construction Law Review*, 1991, pt 3, p. 334. see clause 18 (3.1)(3.2) of the JCT.

<sup>21</sup> S. Al-Tamaui, “*General Principles of Administrative Contracts*”, (Cairo, Dar Al-Feker Al-Arabi, 5<sup>th</sup> Edition, 1991), p. 443.

for a certain period of time because he had been found cheating while performing a contract for the government.

### **C. Assignment of the sub-contract**

A question may arise concerning the possibility of assigning all or part of the sub-contract itself, in another words, can the sub-contractor resub-contract all or part of his contractual obligations? To answer this question one needs to distinguish between the assignment of the financial rights of the sub-contractor, the assignment of part of a sub-contract, and the assignment of all of a sub-contract to a new sub-contractor. Each will be examined in depth.

#### **1. Assignment of the financial rights of the sub-contractor**

Under Saudi regulations there is ambiguity in this regard. The procurement regulations do not clarify the right of the contractor to assign his financial rights to a third party. Because of this gap, one may make an analogy to the regulations which cover the assignment of the main contract. There is nothing to prevent the main contractor from assigning his financial rights to a third party. In fact, there is a benefit and obligation related to the assignment, the right to be paid and the obligation to perform the contract, respectively.<sup>22</sup> A benefit may be assigned regardless of the wishes of the main contractor. The contractual obligation may be assigned only according to the approval of the main contractor. Thus, the sub-contractor may not assign the obligation to carry out the work without the main contractor's consent, and

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<sup>22</sup> K., Al-Jumah, Arab State Contract Disputes: Lessons from the Past, *Arab Law Quarterly*, Vol. 6, Pt 1, 2002, p. 285.

the main contractor may assign the financial rights of the sub-contractor to a third party if the latter agrees to such assignment.<sup>23</sup> There is therefore no clear objection preventing the sub-contractor from assigning his financial rights to another sub-contractor or a third party. This assignment will help the sub-contractor perform his sub-contract, especially if commercial banks have requested him to provide a guarantee or insurance in order to obtain loans from them. He may then assign his financial rights as a means of insurance.

In contrast, the assignment of the financial rights of the sub-contractor clarified under the UK regulations. According to clause 19.2.2 of the JCT 98 and clause 59 C of the ICE form, the sub-contractor has the right to directly pay another sub-contractor or a third party. Clause 19.2.2 makes it clear that the employer may make payment direct to a nominated sub-contractor or third party.<sup>24</sup> In the case of late payment, a new sub-contractor has the right to sue the original sub-contractor only and the latter may sue the main contractor for delayed payment and obtain compensation for any detriment caused by it.

## **2. Assignment of part of a sub-contract**

There are no provisions regulating the assignment part of a sub-contract under Saudi procurement regulations. The assignment of part of the sub-contract depends on the consent of the main contractor on one side and the contracting authority on the other. The consent of the main contractor is

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<sup>23</sup> H., Mahasni, "Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court", *The International Lawyer*, Summer, 1987, p. 837.

<sup>24</sup> JCT 98, Clause 19.2.2.

required because he is the one who selected the original sub-contractor and is responsible for his performance and will be responsible for the performance of a new or second sub-contractor. The main contractor will bear the risk of the default of any new sub-contractor.<sup>25</sup> Therefore, he should confirm his qualification before allowing him to assist in performing the main contract. This will protect the main contractor from dealing with an unqualified sub-contractor. Also, the stipulation of prior consent will prevent any sub-contractor currently involved in dispute litigation with the main contractor from executing part of the main contract. The main contractor can contract with a new sub-contractor provided the contracting authority approves the new sub-contractor has no right to assign any part of his sub-contract if he does not obtain prior consent from both the main contractor and the contracting authority.<sup>26</sup>

In contrast, generally, UK standard forms of sub-contract allow sub-contractors to sub-let part of their sub-contract.<sup>27</sup> However, standard forms distinguish between two types of sub-contract: a normal and a nominated sub-contract. Under the first type, the main contractor has the right to select a sub-contractor subject to the approval of the contracting authority. The contracting authority must not be unreasonably rejected the sub-contractor selected by the main contractor.<sup>28</sup> Under the nominated sub-contractor, two conditions must be satisfied. First, the main contractor must consent to the

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<sup>25</sup> C. Gray, and R. Flannigan, *The Changing Role of Specialist and Trade Subcontractors*, the Chartered Institute of Building, Technical Information Service, UK, 1988, p. 32.

<sup>26</sup> Purchasing Law, *supra* n. 15, Art. 29.

<sup>27</sup> J. Timpson and B. Totterdill, *"Adjudication for Architects and Engineers"*, (London, Thomas Telford, 1999), p. 122.

<sup>28</sup> J. Price, *supra* n. 14, p. 55.



nominated sub-contractor, and, second, the nominated sub-contractor must be approved by the architect.<sup>29</sup> Thus, sub-contracting out part of the work without consent is usually considered a breach of the contract.<sup>30</sup>

### **3. Assignment of the whole of a sub-contract**

The assignment of the whole of a sub-contract depends on the mutual agreement of the parties. As with other regulations relating to sub-contracting, one can find no provision regulating the assignment of the whole sub-contract under Saudi procurement regulations. Notwithstanding, one may compare the assignment of the main contract to the assignment of the sub-contract in order to undertake an analysis of the legality of such assignment. As previously mentioned, the assignment of the whole of the main contract is prohibited by the general principles of the Purchasing Law. However, the Purchasing Law does allow the main contractor to assign part of his contract if the contracting authority consents to this.<sup>31</sup> It also gives the main contractor the power to choose and negotiate the sub-contract with a sub-contractor. In other words, the regulations leave the details of the terms and conditions of the sub-contract to its parties.<sup>32</sup> Therefore, assignment of the whole or part of the sub-contract depends on the mutual consent of the parties. If the parties to sub-contract decide to assign the contractual obligations of the sub-contract to a new subcontractor then the new sub-contractor will have adhere to the contractual obligations of the original sub-

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<sup>29</sup> J. Timpson and B. Totterdill, *supra* n. 27, p. 126.

<sup>30</sup> JCT 98, clause 19.2.2.

<sup>31</sup> Riyadh Chamber of Commerce, *Saudi Construction Sector: Challenges and Ambitions*, a work paper presented by the Riyadh Chamber of Commerce, General Annual Meeting for Saudi Contractors, Riyadh, 10/2/2001

<sup>32</sup> The Minutes & Recommendations of the Eleventh Meeting at the National Committee for Saudi Contractors, The Council of Saudi Chamber of Commerce, 10/3/1997, unpublished document.

contractor, including remedying the defect of his performance. Moreover, even if the parties of the sub-contract agree to assign the whole contract, such assignment is subject to the consent of the contracting authority. It must give such assignment its legitimate approval in order to be valid.

If the contract does not include any provision allowing its parties to assign the whole or part of the sub-contract, then the general principles of assignment, mentioned above, will regulate such matter, which, in fact, give the parties of the sub-contract the power to assign the whole or part of it if the contracting authority approves such assignment.

## **II. Selecting Sub-contractors**

There are two ways to select sub-contractors: selection by the main contractor who may sub-contract the work to any contractor of his choice, or selection by the contracting authority if certain work needs to be executed by a nominated sub-contractor, or to choose a particular contractor to perform part of the main contract. These will be analysed in detail under Saudi and UK regulations.

### **A. Selecting sub-contractors under Saudi regulations**

The Purchasing Law makes no mention of the procedures for selecting a sub-contractor. It leaves the decision to the main contractor to decide how to select sub-contractors. However, the public authority has the power to accept or reject the selected sub-contractor.

In practice, the main contractor will bear the responsibility or burden of selecting a sub-contractor. He is responsible for nominating a sub-contractor and liable to the public authority for defects in work performance by a sub-contractor.<sup>33</sup> It should be noted that unless expressly stated in the contract or other regulation, it is not mandatory for the main contractor to sub-contract a domestic contractor. The Public Works and the Maintenance forms of contract only oblige the contractor to sub-contract, they do not specify local or foreign sub-contractors. As a result, there is no express provision to hire domestic sub-contractors, unless the decision of the Council of Ministers requires foreign contractors to hire local sub-contractors. This may generate a problem if local contractors refuse to hire local sub-contractors, especially if their contracts include sophisticated technology. Hence, clear regulations to regulate when and how main contractors should hire sub-contractors would clarify many ambiguous issues regarding sub-contracting and will protect the contracting authority, main contractors, and local and foreign, sub-contractors.

In international contracts, the Saudi government requires foreign contractors to sub-contract 30 % of the value of their contract to domestic contractors.<sup>34</sup> There are many criticisms of this requirement. It does not specify how and when foreign contractors should sub-contract 30 per cent of their procurement contracts. In practice, many businessmen, traders and procurement contractors complain about the negative implications of this

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<sup>33</sup> *Case no. 32 / D / C / 4 dated 1420 AH (2000).*

<sup>34</sup> The Council of Ministers Decision no. 124, dated 29 / 5 / 1403 AH (1983).

decision for both foreign contractors and the public agencies.<sup>35</sup> On the government side, many public agencies do not require foreign contractors to sub-contract the required percentage when they contract with them. The reasons are related either to the negligence of some public agencies or because of the low qualifications of subcontractors. On the foreign contractor's side, a survey published by the Riyadh Chamber of Commerce showed that some foreign contractors do not sub-contract part of their contracts and most of them sub-contract less than the required percentage.<sup>36</sup> Moreover, foreign contractors select domestic sub-contractors to perform works not central to their contracts. Further, they sub-contract external work not related to the work of the main contract. For example, if a foreign contractor is contracted to build a government hospital, he sub-contracts with local contractors to clear the site of the project or to provide him with workers.<sup>37</sup>

As a result of the negative implications of the requirement to sub-contract 30% of the contract value to domestic contractors, mentioned above, one may submit that it would be better if procurement contracts signed with foreign contractors contained a nomination clause. This would ensure that both foreign contractors and public agencies apply the theme of this decision.

The lack of accountability encourages some public agencies and foreign contractors not to comply with most procurement regulations and

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<sup>35</sup> Riyadh Chamber of Commerce, *Barriers and Obstacles which face Procurement Contractors*, A paper submitted by the Riyadh Chamber of Commerce, October 2002, p. 19.

<sup>36</sup> Riyadh Chamber of Commerce, *supra* n. 31, p. 18

<sup>37</sup> *Ibid*, p. 20.

decisions in general and the percentage of sub-contracting in particular. The law and decision makers should take these deficiencies into consideration and review all procurement regulations to decide their general rules. Moreover, it is submitted that the government should establish a permanent committee representing procurement firms. One of its aims should be the protection of main contractors and sub-contractors.

Another criticism is that the requirement to sub-contract 30% of the contract value to local contractors, does not mention any penalty for not adhering to this requirements.<sup>38</sup> This is not the only weakness in the Council of Ministers' Decision no. 124. It does not include any penalties if domestic contractors refuse to sub-contract part of their procurement contracts. It seems that the Council of Ministers leaves the power to decide which penalty it should impose on local and foreign contractors to the contracting authority. However, such absence of regulation will lead each public agency to imposing a different penalty on main contractors.

It is obvious there is a great difference between Saudi and UK regulations in respect of the nomination approach. Unlike UK regulations, neither Saudi procurement regulations nor government practice indicate that the government nominates sub-contractors. In this regard, there are differences between nominating and selecting sub-contractors in the two procurement systems. Under the Saudi procurement system, the main contractor has the choice whether to inform the public authority during performance of the contract that he intends to sub-contract. He is not

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<sup>38</sup> The Minutes & Recommendations of the Eleventh Meeting at the National Committee for Saudi Contractors, *supra* n. 29, p.3.

required to submit a sub-contract tender with his tender, as is required by some UK regulations. Instead, he may after commencing performance of the contract inform the contracting authority of his intention to sub-contract. Accordingly, the nomination procedure is unknown under Saudi procurement regulations.

## **B. Selecting sub-contractors under UK regulations**

There are two ways to select sub-contractors under UK regulations: selection by the main contractor, or nomination by the contracting authority. In both, the main contractor remains liable for the default of sub-contractors. In the former, the main contractor is under obligation to obtain prior permission from the contracting authority before dealing with sub-contractors, in the latter, the contracting authority requires no prior consent from the main contractor to nominate a sub-contractor.

### **1. The main contractor's selection of sub-contractors**

There is no great difference between Saudi and UK regulations regarding sub-contractors' selection by the main contractor. Prior permission of the contracting authority is required in the two systems before selecting sub-contractors. The other way to select sub-contractors is the nomination approach which needs a more detailed analysis.

## **2. Nominating sub-contractors**

Nominating sub-contractors is a unique policy adopted by UK regulations. It has traditionally been applied to elements such as lifts and mechanical services within buildings and developed to cover modern technology.<sup>39</sup>

The general regulations of nomination are set out below in order to analyse them.

1- It seems unfair that the main contractor should both accept and deal with sub-contractors and be liable for their performance defaults. Thus, the public agency's nomination decision will ensure control over the quality of the sub-contracting performance. It is necessary for the public authority to have plenty of time to deal with specific firms' specialist work. This means that the public authority may send two tender invitations: one for the main tenderers to perform the main contract and the other for sub-contractors to perform only a particular part of the main contract. However, it is not clear if sub-contractors should follow similar tendering procedures to those main tenderers usually follow. What is clear is that the public authority should obtain several tenders in order for the architect to negotiate with the sub-contractor and settle the terms of his sub-contract.<sup>40</sup> Consequently, the price of the nomination sub-contract will be made by the contracting authority. This may balance price against quality or long-term performance.<sup>41</sup>

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<sup>39</sup> Chitty, "*Chitty on Contracts*", (London, Sweet & Maxwell, 1999), vol. 1, p.583.

<sup>40</sup> S. Furst and V. Ramsey, "*Keating on Building Contracts*", (London, Sweet & Maxwell, 7<sup>th</sup> edition, 2001), p.358.

<sup>41</sup> P. Barber, *Liability for Default of Sub-contractors*, paper submitted to the Chartered Institution of Building, no, 129, 1991, p.3.

2- Usually, under UK regulations, standard forms of building contracts stipulate that the contracting authority may nominate sub-contractors. In practice, the UK contracting authority negotiates with sub-contractors during the tendering stage of the main contract. Consequently, before the main contractor commences execution of the work he will know how many sub-contractors he will be dealing with during performance of the contract.

Interestingly to note that clause 35.2 of JCT 98 allows the main contractor to send his tender to perform work as a sub-contractor.<sup>42</sup> Thus, he has the right to submit two tenders: one to perform the main contract and the other to perform the sub-contract for which the contracting authority has invited tenderers to submit tenders. In such a case, the main contractor's offer must follow procedures relating to sub-contracting. One may dispute this allowance because it contradicts the aim of sub-contracting, that is, to find professional contractors to perform specialist work.

By allowing the main contractor to contract as a sub-contractor, the government prevents other sub-contractors from performing part of the main contract. In addition, it is necessary to specify a particular part of the main contract to be performed by sub-contractors if the public authority permits the main contractor to execute it. Consequently, this regulation will help the main contractor perform his contract alone without the participation of sub-contractors. As a result, this will encourage the main contractor to send his tender as a sub-contractor. Thus, it is submitted that this regulation should be altered or deleted in order to protect the rights of sub-contractors. In fact, the

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<sup>42</sup> JCT 98, Clause 35.2.



national economy will benefit if the main contractor is prevented from contracting as a sub-contractor in his original contract. This prohibition will provide trade opportunities for small and medium firms to participate in the execution of the original contract.

3- It is worth mentioning that even if the contracting authority reserves the right to nominate sub-contractors, the main contractor also has the right to accept or reject a nominated sub-contractor. According to the NSC/T form, the architect is required to send a copy of the tender invitation of the nomination to the main contractor, including any design or specifications.<sup>43</sup> The main contractor is obliged to accept or reject the nomination within ten days from receiving the letter of the architect. He is required to send a written notice to the contracting authority regarding his intention. If he rejects the nominated sub-contractor, he is under obligation to inform the contracting authority of the reason for his objection. If the contracting authority finds genuine reasons for such rejection, it is necessary, according to clause 35.9.2 of JCT 98, to nominate another sub-contractor.<sup>44</sup> Accordingly, in *Percy Bilton Ltd. v. GLC*, the architect delayed in re-nominating a sub-contractor and the contractor requested an extension of the period of the contract. The terms of the contract included a condition which stated that the employer was entitled to liquidated damages for any period during which the work remained uncompleted after the time for completion. The employer deducted the liquidated damages and the contractor challenged such action because the architect had delayed in re-nominating another sub-contractor.

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<sup>43</sup> NSC/T Sub-contract Form, part 2.

<sup>44</sup> JCT 98, Clause 35.9.2

The House of Lords held<sup>45</sup> that it would be a breach of contract by the employer if his failure to nominate a sub-contractor had impeded the contractor in the execution of his work.

As a consequence, the main contractor has the right, according to clause 35 of the JCT 98, to prevent the nomination of any sub-contractor who does not offer to complete his work within the overall completion period for the contract as a whole.<sup>46</sup> In the same context, clause 35 (a)(ii) provides that the architect shall not nominate any person as a sub-contractor... who will not enter into a sub-contract which provides that the nominated sub-contractor shall observe, perform and comply with all provisions of the contract ... so far as they relate and apply to the sub-contractor works.<sup>47</sup>

This theme was taken up by the Court of Appeal in *Fairclough Building Ltd. v. Rhuddan DC*.<sup>48</sup> In this case, the sub-contractor stopped work and repudiated the sub-contract, which was then terminated by the main contractor. The main contractor required the architect to nominate a sub-contractor to complete the work, but the architect delayed issuing instructions to re-nominate a new sub-contractor and the re-nomination did not cover remedial work. The judgement drew guidelines for the responsibility of re-nomination. In fact, three main rules were included in this judgement. It was held that a newly nominated sub-contractor is obliged not only to cover uncompleted work, but also to redo work which the original nominated sub-contractor has done imperfectly. In addition, a re-nomination instruction must

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<sup>45</sup> *Percy Bilton Ltd. v. GLC*, [1982] 2 ALL ER 623.

<sup>46</sup> JCT 80, Clause 27 (a).

<sup>47</sup> P. Barber, *supra* n. 41, p. 8.

<sup>48</sup> *Fairclough Building Ltd. v. Rhuddan DC*, (1985) 30 B.L.R. 26.

include both remedial and uncompleted work. Moreover, a contractor can refuse to accept re-nomination of a substitute sub-contractor who does not offer to complete his part of the work within the overall period for the contract.

Further, the House of Lords has provided a solution for the repudiation of sub-contracts. It held in *NW Metropolitan Hospital Board v. Bickerton* that where a nominated sub-contractor repudiated the sub-contract by failing to complete or failing to perform it, the architect was obliged to re-nominate a new subcontractor.<sup>49</sup>

4- Neither the Public Works regulations nor Supply or Services regulations include any provisions regarding nomination of sub-contractors in the tendering stage. Arguably, contractors should be informed that they may be forced to deal with sub-contractors nominated by the contracting authority. Provisions regarding this issue should be added to the aforementioned regulations in order to give contractors a clearer idea of their duties.

5- In fact, one may criticise the nomination approach in many ways: it prevents the main contractor from making his own choice of a sub-contractor who will perform part of the main contract. This restriction will prevent the main contractor from imposing his own terms and conditions and forces his acceptance of the terms and conditions of a third party. On the other hand, the contracting authority will benefit from this approach because it can select a professional specialist sub-contractor to perform high quality work.

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<sup>49</sup> *NW Metropolitan Hospital Board v. Bickerton*, [1970] 1 W.L.R. 607. cited on *Chitty on Contract*, VOL. 2, P. 714.

Moreover, a tendering procedure approach which follows nomination of a sub-contractor will allow the contracting authority to apply the value for money procedure which will encourage it to select the most economically advantageous sub-contractor. Consequently, nomination can be avoided if specialist works are described in terms of performance specifications and the main contractors invited to tender are given sufficient time to make their own enquiries among specialist sub-contractors.<sup>50</sup>

The other major criticism is that where the nominated sub-contractor withdraws or refuses to continue his sub-contract, the contracting authority is responsible, as mentioned above, to nominate another sub-contractor and pay the main contractor the additional cost of the new nominee's quote. The contracting authority's role is to safeguard public funds and to take any steps necessary to protect public money. Re-nomination will force the public authority to waste public funds in order to pay compensation to the main contractor and to pay the difference in price between the old and the new sub-contract. It is submitted that the contracting authority should avoid the nomination approach and allow the main contractor to select his sub-contractors under the consent and control of the contracting authority.

6- The nomination policy enables the contracting authority to select a sub-contractor of the right experience and quality to perform specialised work. If the performance of the main contract is delayed by a nominated sub-

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<sup>50</sup> S. Furst and V. Ramsey, *supra* n. 40, p.249.

contractor, the main contractor has the right to extend the period of the contract as stipulated by clause 35.24.2 of JCT 98.<sup>51</sup>

Moreover, the sub-contractor is required to perform in a professional way. If he fails to perform or to complete the work, then the contracting authority will be required to nominate another sub-contractor to complete the work.

In general, there is no relationship between the employer and a nominated sub-contractor once he is nominated and has commenced his work. However, a question may arise concerning his responsibility regarding repudiation of the nominated sub contractor: is the main contractor responsible for completing unfinished work and paying the expense caused by such repudiation, the delay in the performance programme of the main contract, and nominating a new sub-contractor? In fact, the employer is contractually bound to re-nominate another sub-contractor as a second substitute sub-contractor if the first is repudiated by failing to complete or to perform, and to pay the second sub-contractor's account, including any remedy, to the main contractor. The House of Lords in *North West Regional Hospital Board v. T.A Bickerton & Son Ltd (Bickerton case)*<sup>52</sup> clarified some of these issues. The employer nominated the sub-contractor to install the heating system at the hospital. During the performance period the nominated sub-contractor went into liquidation and the employer nominated a second sub-contractor. The main contractor claimed that the second nominee's price was higher than the first. The House of Lords held that the employer is

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<sup>51</sup> JCT 98, Clause 35.24.2.

<sup>52</sup> *North West Regional Hospital Board v. T.A Bickerton & Son Ltd* [1970] 1 W.L.R 607.

obliged to nominate which main contractor has responsibility for completing the work, not to hire a sub-contractor. Moreover, the employer is responsible for bearing the additional costs arising from the replacement sub-contractor's higher price.

Although the employer is responsible for nominating a sub-contractor, this responsibility is restricted. The employer should make every effort to find a substitute for the original sub-contractor. The main contractor has the right to compensation for any default caused by the nominated sub-contractor if the employer takes an unreasonable time to re-nominate a subcontractor. As a result, The House of Lords rejected the claim of the main contractor to extend the period of the contract because the employer's responsibility extended only to re-nomination within a reasonable time.<sup>53</sup>

Loss arising from failure or withdrawal of the nominated sub-contractor must be borne by the contractor. The employer must renominate within a reasonable time of notification from the contractor.<sup>54</sup> Failure to do this entitles the contractor to extension of time and gives him grounds for any loss caused by unnecessary delay to renominate.<sup>55</sup>

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<sup>53</sup> *Percy Bilton Ltd. v. GLC*, [1982] 2 ALL ER 623.

<sup>54</sup> *Ibid*, 623.

<sup>55</sup> JCT 98, Clause 35.24.10.

### **III. Obligations of sub-contractors**

Sub-contractors have many obligations with which they should comply. These obligations are a small scale picture of the obligations of the main contractor. One can summarise these obligations under many categories:

First, the sub-contractor should carry out his obligations carefully and in accordance with his contract. He is obliged to provide all labour, supervision, material, etc. However, he may request the main contractor to provide him with any tools or machinery if his contract stipulates their use. If not, he is responsible for buying them. He is required to use his best endeavours and all reasonable skill and care during his performance, to provide good quality work fit for the intended purpose, to complete the work during the required time, and prevent any delay in the progress of the performance.<sup>56</sup>

Second, the main contractor is required to organise his workers and the sub-contractor's workers and not to take any measure or decision which will prevent them from performing their contract. In this regard, as a general rule, the sub-contractor has the right to take any step, either to complain to the contracting authority or to sue the main contractor, to force him to remove any obstacles which may prevent him from executing his contract.<sup>57</sup>

Third, the main contractor is required to pay a sub-contractor as stipulated in the contract. In this regard, the sub-contractor is responsible for

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<sup>56</sup> *Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 AC 454.

<sup>57</sup> I. Hurlimann, Subcontracting in Switzerland National Report, [1991], pt.2, *The International Construction Law Review*, p. 158.

fulfilling the terms of the contract in order to receive payment. He should send a report, either monthly or periodically, describing the work performed, and requesting the main contractor to inspect and test the work, and to pay him. On completion, the main contractor is required to check the work and send a report of completion to the contracting authority and then to issue a letter of completion if he does not have any questions or reservations regarding the work. Any delay in payment will be subject to compensation if the main contractor has no reasonable justification for such delay.<sup>58</sup> In this context, the contracting authority may withhold any payment to the main contractor if he does not pay a sub-contractor, and pay the sub-contractor as detailed in chapter 5.

Fourth, the work site should be a safe place for the workers and those neighbouring the site. The sub-contractor should agree with the main contractor about the best ways to secure its safety. Under Saudi regulations, both the main and sub-contractors are obliged to comply with the Safety Procedures in Public Places issued by the Civil Defence (*Al-Defa Al-Madani*) which specifies the safety policy for the work site. Similarly, sub-contractors under UK regulations are required to comply with the Health and Safety at Work Act 1974. Consequently, the sub-contractor is required to take out and maintain insurance against claims for any accident which may be caused by the carrying out of the work.<sup>59</sup>

Fifth, if the sub-contractor completes the work, he should notify the main contractor in order to inspect and test the work. If the test is a failure

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<sup>58</sup> JCT 98, clause 25.2.1.1.

<sup>59</sup> JCT 98, clause 21 and 22.



the main contractor may issue a rejection stating his reasons and the sub-contractor is under obligation to satisfy such failure. This means replacing or amending the work to overcome the main contractor's objections. If reworking takes place, then the sub-contractor is obliged to request the main contractor to test it again. If the main contractor accepts the work he should inform the contracting authority in order for the latter to re-inspect and test the work and to issue a completion letter if it does not have any further comment regarding the work.

Sixth, in general, the main contractor is obliged to guarantee the work and is liable for defect caused by his sub-contractors during the defects liability period. In this context, the two procurement systems have different rules regulating the defect liability period. In fact, there is no express provision determining the defect liability period under Saudi Purchasing Law.<sup>60</sup> Article 30 of the Implementing Regulation addresses the liability of the main contractor only in construction contracts in particular. It states that the contractor shall be liable for the total or partial collapse of the construction built by him if this occurs within ten years from the date on which such construction was handed over to the public authority, if the collapse is due to a defect in the work.<sup>61</sup> In fact, the parties of the contract have the right to agree to a shorter period. Making an analogy to this provision, then one can say that the parties of the sub-contract can agree to specify a particular period to cover the defect liability. In contrast, under the UK regulations,

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<sup>60</sup> Dr. M. Al-Fawzan, *Legislative Regulation of Maintenance and Operation*, a work paper presented to the International Forum for Maintenance and Operation in Arab Countries, Beirut, Lebanon, *Al-Jazirah Newspaper*, Wednesday 6/8/2003, Issue no. 11269.

<sup>61</sup> Implementation of Purchasing Regulations (Implementing Regulations), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 30.

twelve years after practical completion of the contract is the defect liability period.<sup>62</sup>

It should be noted that the sub-contractor is liable for any defect from the date of completion of the sub-contract and not from the date when the contracting authority discovered the defect. The length of the defect liability period is usually stated in the sub-contract.<sup>63</sup> It normally runs from the date of completion of the sub-contract work. A question may be raised regarding the sub-contractor's liability if the contracting authority discovers a defect after the defect liability period has expired and before the warranty of the main contract takes effect? In general, the main contractor is responsible for any fault of his sub-contractors, even if the defect liability period has expired. However, the sub-contractor remains responsible for any defect discovered before or after the expiry date of his defect liability.

Seventh, although the general rule requires all contractors to submit a performance bond<sup>64</sup> to secure any default in the performance of the work, the Purchasing Law does not clarify whether sub-contractors should submit such bond. Consequently, by analogy to the performance bond of the main contractor, one may suggest that the sub-contractor should pay a similar percentage (10%) of the value of the contract as a performance bond for the sub-contract. In contrast, the UK regulations clearly request a performance

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<sup>62</sup> J. Price, *supra* n. 14, p. 93.

<sup>63</sup> C. Seppla, French Law on Subcontracting, [1991], pt.1, *The International Construction Law Review*, p. 80.

<sup>64</sup> Section III of chapter six discussed of performance bond regulations.

bond. Under all JCT related forms of sub-contract, the percentage applied to the tender price to determine the sum bonded is usually 10 per cent.<sup>65</sup>

#### **IV. A comparative analysis**

This comparative analysis will shed light on similarities and differences between sub-contract regulations under the two procurement systems in order to provide useful lessons for law-makers to improve sub-contracting rules in the two systems in the future.

It is first noted that Saudi procurement regulations pay little attention to the rights of sub-contractors. Saudi procurement regulations have only three articles which stipulate that the main contractor must obtain prior permission from the public authority before sub-letting part of his contract. The three articles of sub-contracting under Saudi procurement regulations concentrate only on the main contractor being required to obtain prior permission from the public authority before hiring sub-contractors. There is thus a great omission in Saudi procurement regulations. Sub-contractors need to know their rights and duties before dealing with main contractors or with the government. Therefore, Saudi lawmakers should rectify this lack and issue a standard form for sub-contracting in order to protect the rights of sub-contractors and to delineate their duties when dealing with main contractors. In contrast, the UK system includes many forms of sub-contract regulate the rights and obligations of sub-contractors.

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<sup>65</sup> J. Price, *supra* n. 14, p. 203.

There are several major differences between the two systems regarding the assignment of the main contract. Under Saudi regulations, the main contractor does not have the right to assign the whole contract. When he deals with the government, he remains directly liable under his agreement whatever the situation. It should be noted here that the decision prohibiting assignment applies in normal circumstances, such as when the contractor does not want to continue performance of the contract, or he faces financial difficulties. Unusual circumstances, such as *Force Majeure*, or *Act of State*, have different solutions. Consequently, the main contractor is allowed only to sub-contract part of his contract. In contrast, the UK regulations allow the main contractor to assign the whole or part of his contract. In practice, the contracting authority's prior consent is required for the assignment of the whole or part of the contract. In general, the main contractor has no right to assign the whole contract. However, if the main contractor faces difficult circumstances then the contracting authority will carefully consider what to do regarding his demand to sub-let his contract. If the contracting authority accepts his justifications for assigning the whole of his contract, then it should allow him to withdraw from the performance of the contract. It is nevertheless unusual to allow the main contractor to assign the whole procurement contract to another contractor. In addition, it is also a difficult decision to have to make because it affects the rights of other tenderers who have sent their tenders to perform the contract and it may contradict the general rules of equal treatment and transparency as discussed earlier in the chapter. Thus, the main contractor must provide very strong reasons why he

is forced to assign the contract before requesting the contracting authority to justify his demand to assign the whole contract.

The main contractor may sub-let part of his contract if the contracting authority permits him to do so. If the contracting authority nominates the sub-contractor there is no need for such permission to be given to the main contractor, unless he rejects a particular nominated sub-contractor. In this case, the contracting authority, if it accepts his rejection is required to nominate another sub-contractor. In this regard, the main contractor will be notified that the contracting authority will select the sub-contractor to perform a particular work. Usually, in practice, the contracting authority requests tenders for particular work during the tendering stage of the main contract as explained in the following.

Selection of sub-contractors is governed by different rules in the two procurement systems. The Saudi procurement regulations do not contain any provision clarifying how and when to select sub-contractors. This lack leaves the door open for the main contractor to follow different selection procedures. In practice, the main contractor bears the responsibility for selecting his sub-contractors. As a consequence, the terms of conditions of the sub-contract are subject to the mutual consent of its parties. Hence, in the absence of a standard form of sub-contract, the terms and conditions may differ from one sub-contract to another. In addition, unlike the procedures under UK regulations, the Saudi contracting authority leaves the selection of sub-contractors to the main contractor subject to its consent. It is unusual for the contracting authority to nominate sub-contractors. Neither the procurement

regulations nor the practice of the government in procurement contracts allow the contracting authority to nominate sub-contractors. In other words, the main contractor has only the right to decide when he needs to sub-let part of his contract. In practice, main contractors usually make their decision to hire sub-contractors after commencing the performance of the contract. It is rare for main contractors to make a decision to sub-let part of their contract before starting the performance of their contract.

In contrast, the selection of sub-contractors differs under the UK regulations. In fact, there are two ways to hire sub-contractors: selection by the main contractor or nomination by the contracting authority. In the first, the main contractor, similar to Saudi practice, is under obligation to obtain prior permission to sub-contract. This permission is a shield of protection for the authority since it encourages the main contractor to select a qualified sub-contractor. The contracting authority has the right to reject any sub-contractor without any justification. In the second, the contracting authority bears the responsibility for nominating sub-contractors. The contracting authority usually sends invitation letters to sub-contractors during the tendering stage of the main contract. In fact, the contracting authority follows similar procedures to the tendering procedures of the main contract, such as inviting, receiving and evaluating all tenders to select the successful sub-contractor. As a result, the contracting authority has the power to decide the terms, conditions, price, and the specifications of the nominated sub-contract. Accordingly, the main contractor should know the names and numbers of nominated sub-contractors before commencing his performance work.

The nomination approach has been subject to much criticism. Criticism arises when analysing the tender procedures of the main procurement regulations, e.g. Public Works, Supply and Services Contract Regulations. Here, one may notice that they fail to include any provision regulating the tendering procedures of the nomination of sub-contractors.

The assignment of the sub-contract by subcontractors under the two procurement systems is another area requiring further discussion. In fact, Saudi procurement regulations do not contain anything on this subject. One cannot find even a circular or governmental instruction regulating such assignment. As a customary rule, in the absence of any provision to regulate a particular subject, the contracting authority and the Board usually refer to the general rules. As a result, if the sub-contractor wishes to assign the whole or part of his sub-contract, the contracting authority should apply the rules of the assignment of the main contract. Thus, if he wishes to assign part of his sub-contract, he should obtain two permissions: that of the main contractor and the permission of the contracting authority. The main contractor's permission is required because he was the one who selected the original sub-contractor, therefore, he must confirm the new sub-contractor. The permission of the contracting authority is also required according to the general rules of sub-contracting which require the main contractor to obtain the consent of the public authority before sub-letting part of his contract.

The controversial issue is the assignment of the whole sub-contract.

The nature of the main contract differs from that of the sub-contract. While the main contract follows long and complicated tendering procedures, the

sub-contract is made by the mutual agreement of the parties concerned. In addition, the general rules prohibit the assignment of the whole main contract, while the rights and obligations of the sub-contract are set by the parties' mutual agreement. Therefore, one can say that the general rules of the assignment of the main contract do not cover the assignment of the sub-contract under Saudi procurement regulations. Consequently, because the parties of the sub-contract have the power to set their rights and obligations, they may agree to allow the sub-contractor to assign his rights and duties to another sub-contractor. However, this agreement should be subject to the consent of the contracting authority. In other words, the contracting authority may not reject the notion of the assignment of the whole sub-contract, but may reject the new sub-contractor so forcing the original sub-contractor to select another sub-contractor.

The obligations of the parties of the sub-contract differ under the two procurement systems. There is only one provision under the Saudi procurement system which regulates such obligations. Article 14 of the Implementing Regulation states that the main contractor is responsible for the performance of the sub-contractor. Neither the procurement regulations nor the practice of the government clarify such obligations. This lack is a direct reason for the lack of protection of the rights of the parties of the sub-contract. It is obvious that the law-makers leave the determination of these rights and obligations to the Board of Grievances. In this context, because of the Board's decision not to publish its judgements, it is difficult to gain a clear picture of this subject. It is strongly recommended that new regulations



should be issued to protect the rights of the parties of the sub-contract and that the Board should publish its judgements in order to develop the procurement sector in the first place and to develop lawmakers' awareness of the repeated problems related to sub-contracts.

In contrast, there are three dimensions to the obligations of the parties of the sub-contract under UK procurement regulations: the relation between the main contractor and sub-contractors, the relation between the main contractor and the contracting authority, and the relation between the sub-contractor and the contracting authority. Firstly, the main contractor is responsible for the default of the sub-contractor, especially if he selected him. The contracting authority has the right to compensation or liquidation damages for such defect. In turn, the sub-contractor remains responsible to the main contractor for his performance. He must perform the work and complete it before the due date stated in his contract. He bears the responsibility for rectifying any defect in his work, even if his defect liability period has expired. If he cannot return to the site to rectify the defect, he must pay the cost of the rectification. If the contracting authority nominates the sub-contractor and the sub-contractor withdraws himself from the site or refuses to continue to the completion of the sub-contract, then the contracting authority is under obligation to nominate another sub-contractor, and to pay the main contractor for any cost incurred because of this. In general, there is no relationship between the contracting authority and the sub-contractor. However, if the contracting authority has instructed the sub-contractor or ordered him to do a particular work, it is responsible for the

consequences of this instruction. If the sub-contractor requires additional time to finish such work, then the contracting authority must extend execution of the main contract in order to fulfil the contractual obligations of the main contractor.

## **Summary**

This chapter has investigated the basic rules of subcontracting under Saudi and UK procurement regulations. Much criticism can be made of the Saudi sub-contracting system. In general, it has paid insufficient attention to issuing a standard for sub-contracting or to regulating the basic rights and obligations of sub-contractors.

The systems of sub-contracting rules which have existed throughout Saudi Arabia and the UK differ. While the UK regulations are based on standard forms, Saudi sub-contracting rules are based on a few provisions, the procurement practice of the public agencies, and the judgements of the Board. Consequently, a sound framework regulating sub-contracting notion is not yet in place. In fact, there are no specially designed rules for sub-contracting nor clear regulations protecting the rights and duties of sub-contractors under Saudi procurement regulations.

The case is different under UK regulations. The rights and duties of sub-contractors are specified and protected by various forms of sub-contracts most noticeably in the building and construction contracts.

Further, the two procurement systems differ in regulating the assignment of the sub-contract. UK regulations allow assignment of the whole and part of the main contract, While Saudi regulations only allow the main contractor to assign part of his contract with the consent of the contracting authority.

Moreover, the UK procurement system applies two approaches for selecting sub-contractors, nomination, in which the contracting authority has the power to select sub-contractors, and the non-nomination approach, when the main contractor is responsible for finding a suitable sub-contractor. In contrast, Saudi procurement regulations permit the main contractor only to select his sub-contractors.

Chapter eight will investigate the rights of the contractor after commencing execution of the contract. It will focus on the right of contractors to receive payment.

## Chapter Eight

# The Right of the Contractor to Receive Payment

## **Chapter Eight: The Right of the Contractor to Receive Payment**

The right of contractors to receive payment from the public authority is a fundamental right and one of the most important obligations of the public authority. Methods of payment differ from one contract to another. While some contracts stipulate payment in instalments, others adopt payment monthly, or after the goods have been received. However, in some contracts, contractors are under an obligation to pay the public authority, such as leasing and auction contracts. In a concession contract, the concessionaire is responsible for providing finance for the project and obtains his remuneration from the end users of the public services.

When contractors prepare their tenders, they should expect to face some kind of risk, such as late payment, therefore, they should take appropriate measures to deal with this possible eventuality. Dealing with the government and engaging in procurement business will give contractors some experience of the problems which may arise during the performance of the contract. Therefore, good communication with other contractors and a procurement information bank will help contractors identify, analyse, manage or avoid such problems.

The price of the contract must not be subject to any modification or change. Although the public authority has the power to alter and modify the conditions of the contract, any modification of the amount of the contract is an exception to the general rule. Notwithstanding the regulation of this rule, the contractor is unlikely to be paid exactly the sum specified in the contract, given that every contract may be subject to variations, claims, fluctuation in

payment or other factors as a result of which the figure will require adjustment.<sup>1</sup>

The right to payment must be expressed in the contract. There are no methods of payment specified in the two procurement systems. In fact, payment methods depend on the type of contract and are usually specified at the tender stage.

The contractor's obligation is worthy of comment. In order to obtain payment, the contractor must fulfil his part of the contract. He must comply with the terms of the contract and perform everything that was agreed. Any negative comment or reservation about his performance may lead to delay in payment. The procurement regulations therefore oblige the contracting authority to send the contractor a warning note if he is negligent in his performance. On the other hand, the contracting authority's most important obligation is to pay the contractor his financial rights at the agreed time.

This chapter deals with the contractor's right in case of late payment of the contract price under Saudi and UK regulations. First, it will examine Saudi regulations through analysing the methods of payment, reasons for late payment, the rights of contractors to suspend work if they do not get paid, and the decisions of the Board of Grievances regarding late payment. Second, it will examine the right of contractors to get paid under the UK regulations by analysing the problem of late payment, the rights of contractors to suspend

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<sup>1</sup> Chitty, "*Chitty on Contracts*" (London, Sweet & Maxwell, 1999), vol. 1, p.569. For example, if a private contractor contracts to build a bridge for the amount of four million pounds and during the performance of the contract he fails to comply with the specifications and the contracting authority penalises him by reducing the price of the original specification, this means he will not receive the price of the contract in full but he will receive an amount lower than the original price because the contracting authority has reduced the value of the original specification.

work if they do not get paid, and their right to obtain plus interest compensation to remedy their suffering from delayed payment.<sup>2</sup>

It is important to mention, as indicated in chapter one, that even if this study's prime focus is concentration on public contract regulations, it is necessary to discuss some rules in different regulations, notably, the constitutional law of the United Kingdom, the budget phase in particular, and the contract laws of England and Wales, Scotland, etc. in order to explain the procedures and reasons for delay in the contractor's payment, because reasons for late payment are related to the sum available in the public budget and financial procedures for paying contractors.

In the case of Saudi public contracts, there is a strong relationship between the contract and budget phase because the contracting authority should not be party to a public contract unless its budget can cover the price of such contract. In addition, if the contracting authority signs a contract lasting more than one year, the Finance Ministry will not give the contracting authority the whole amount of the contract value in one payment but will give it in instalments over the contract period. However, in certain circumstances, instalments may be deferred, for example, in the case of war or an overall decline in the country's or global economy. In normal circumstances, there is no adverse affect to the contractor funding is deferred because he usually gets paid if he continues to execute the work and meet performance deadlines. He submits his bills to the contracting authority which should pay them on demand. However, in abnormal circumstances, such as a dramatic

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<sup>2</sup> The right of sub-contractors to receive payment was discussed in detail in Chapter Seven.

decline in oil prices, such as occurred in the 1980s and mid 1990s, the Finance Ministry may delay payment for some considerable time. Similar to Saudi practice, UK public agencies are allowed to enter into a public contract if their budgets are sufficient to meet contractors' financial demands.

## **I. Payment under Saudi Procurement Regulations**

This part of the chapter will analyse payment methods, reasons for late payment, the right of a contractor to suspend work, Board decisions regarding late payment, and the rights of sub-contractors. Each will be discussed separately below.

### **A. Saudi budget deficits**

Before analysing the right of the contractor to receive payment, an important economic issue should be mentioned in the preamble to this section. The Government of Saudi Arabia has recorded budget deficits annually for the last two decades, with the shortfall for 1993 estimated at USD 13 billion, or 11 per cent of GDP.<sup>3</sup> The government originally financed its fiscal shortfalls by drawing upon deposits in the Saudi Arabian Monetary Agency (SAMA), the country's central bank, and borrowing between 1988 and 1998 through the issuance of government bonds and bills to conserve its remaining assets.<sup>4</sup>

In 1991, following the Second Gulf War, the Saudi government expanded its borrowing when it signed loan syndications with international

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<sup>3</sup> The Saudi British Bank, *The Fiscal Budget 2003: Economic and Fiscal Highlights 2002-2003*, July 2003, p. 6.

<sup>4</sup> Saudi American Bank, *Saudi Arabia's 2004 Budget: 2003 Performance*, Samba Chief Economist, 16 December 2003, p. 8.



and domestic banks and introduced treasury bills. By the end of 1993, total Saudi government domestic and foreign debt had reached an estimated USD 80 billion, or 65 per cent of GDP. Over 90 per cent of this debt is owed to domestic creditors: autonomous government institutions, commercial banks, and individual Saudi citizens.

Dependence on the production and export of oil remains undeniably heavy. As mentioned in chapter two, oil still accounts for over 70 per cent of government revenues and close to 90 per cent of exports.<sup>5</sup> An inevitable consequence of oil dependency is an economy subject to oscillations in the world price of oil. This is reflected in volatile export revenues and a resulting fluctuation in government spending.

## **B. Methods of payment**

First, the Purchasing Law recognises that in some contracts, especially large contracts, a contractor needs money to start his project. Therefore, it had initially given the public authority the right to make an advance payment of up to 20 per cent of the value of the contract <sup>6</sup> to the contractor as a means to help him meet his needs to start the work. In 1985, the Council of Ministers reduced this to 10%, and stipulated that the amount must not exceed 100 million SR (£6500000), whatever the value of the contract. <sup>7</sup>

The advance payment is to help the contractor commence his performance of the work. Therefore, it must be paid directly after the

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<sup>5</sup> A. Al Tuwaijeri, Secretary General of the Supreme Economic Council, in a speech delivered in Washington DC, Monday, April 22, 2002, focusing on Saudi Energy and Economic Relations from a Global Perspective.

<sup>6</sup> Purchasing Law, Royal Decree no: M / 14 dated 7 / 4 / 1397 AH (1977), Art. 8 (a).

<sup>7</sup> Council of Ministers' Decision no. 76 dated 2/4/1405 AH (1985).

procurement contract is signed. Advance payment is a sign of the desire or intention of the contracting authority to have the contract performed in good faith and to assist the contractor to perform it in good faith by removing initial difficulties. However, "it is likely to be conditional upon the provision of a repayment bond."<sup>8</sup> Where advance payment is made, there is likely to be a reduction in subsequent periodic payment proportional to the value of the work performed".<sup>9</sup> The Public authority may deduct such payment by instalments commensurate with the work as it is completed. Moreover, Article 8(b) of the Saudi Public Works Standard Contract stipulates that the advance payment must be requested before the contract has been signed by the parties. If the contractor does not request advance payment before he signs the contract he has no right to obtain such payment.

Second, the Purchasing Law and Saudi Public Works Standard Contract<sup>10</sup> contain model provisions that describe how to pay the contractor. Article 8(b) covers payment methods after paying the advance amount and stipulates that "the contractor's financial rights payable to him in instalments according to the progress of work, provided the sum paid to him does not exceed the value of the work completed...the contract shall also stipulate the dates and methods of payment to the contractor".<sup>11</sup> In practice, this article applies to all contractors, regardless of the nature of the work assigned to them. Accordingly, the contractor must be paid periodically, at least one bill a month, according to the progress of the work, and the amount must not

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<sup>8</sup> The requirement of provisions of a repayment bond is explained in Chapters Four and Seven.

<sup>9</sup> Chitty, *supra* n.1, p.573.

<sup>10</sup> Public Works Standard Contract, Council of Ministers Decision no. 136 dated 13/6/1408 AH (1988),

<sup>11</sup> Purchasing Law, *supra* n.6, Art. 8 (b).

exceed the value of the work completed.<sup>12</sup> In some contracts, supply contracts, for example, the public authority usually pays the full amount to the contractor after the delivery of goods. However, one should mention that there are some general rules which government agencies usually follow before paying the contractor:

1. In some contracts, such as public works, catering, maintenance and operation contracts, the public authority is under an obligation to withhold the last instalment until completion of the work and preliminary delivery of the work.<sup>13</sup> In fact, this is common practice in procurement contracts. Usually, procurement regulations in most countries give the contracting authority the right to hold the last bill or some of it in order to make sure the contractor fulfils his contractual obligations.<sup>14</sup>
2. Before paying the last instalment, the contractor must present specific certificates to the authority to show that he has satisfied some of his general obligations, such as a certificate from the Department of *Zakaht* and Income Tax to prove that he has paid his *Zakaht* or income tax.<sup>15</sup>

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<sup>12</sup> Public Works Contract Standard, *supra* n. 10.

<sup>13</sup> Purchasing Law, *supra* n. 6, Art. 8 (b).

<sup>14</sup> T. Riad, Egypt: Disputes Relating to Public Administrative Contracts,(1997), 1(1), *International Arbitration Law Review*, p. N25.

<sup>15</sup> Finance Ministry circular no. 17/ 31427 dated 15/7/1409 AH (1989). *Zakaht* in the Arabic language means increment, growth, and/or purification of soul and wealth. According to Islamic regulation, *Zakaht* is the third of the five pillars of Islamic. The *Zakaht* is a tax on capital and earnings, collected at certain times and then distributed to stated people or bodies. In practice, in Saudi Arabia, personal *Zakaht* is paid individually and directly to the needy without any mediation from the government. However, the Department of *Zakaht* and Income Tax is responsible for collecting *Zakaht* from all Saudi and foreign businesses in the country.

3. The contractor must submit a certificate proving that he has paid his workers their salaries, after every three bills. The reason behind this requirement is not related to the contractor but to the public authority. Delaying payment to contractors causes many difficulties, one of which is the contractor's inability to pay his workers their financial rights. Contractors sometimes delay paying them because they have not received their monetary rights from the public authority. In fact, in many contracts, workers have refused to continue their work until they have received their salaries. Some of them have demonstrated against the delay of their payment.<sup>16</sup> Unfortunately, contractors have no right to suspend the work nor to terminate it without prior consent from the Board, even if they do not get paid on time.<sup>17</sup> When the government representative met contractors, they complained that they could not pay their workers if the public agencies did not pay them. The Council of Ministers studied this situation and requested contractors to include with their second and third bills a certificate proving they had paid their workers.<sup>18</sup>

Contractors usually satisfy such requirements before finishing their contracts. However, the fourth condition, proof of payment of money due to workers, is a significant policy to protect the rights of workers. The government has the right to force contractors to pay them on time. However,

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<sup>16</sup> In many procurement contracts, workers have refused to go to work unless contractors pay them on time.

<sup>17</sup> The right to suspend work will be analysed in the next section.

<sup>18</sup> Royal Order no. 4/B/14521 dated 11/9/1420 AH (2000) and Royal Order no. 8/1075 dated 24/10/1408 AH (1989).

the government also has a contractual obligation to pay the contractor in specific periods; therefore, it must respect this obligation. It is common business practice that contractors rely on the payment from the government to pay their expenses, including their paying workers' salaries. Consequently, it is not fair to delay payment to the contractor who has to pay his workers without delay. Delayed payment to contractors forces them to take out loans with commercial banks in order to be able to pay their workers, which causes them additional cost. Unfortunately, most of the additional costs caused by late payment are not recoverable, as explained below on p. 327. For example, banking fees which usually accompany loans are not compensated under Board practice. The Board, as discussed in chapter nine, adopted the general principle not to recompense banking fees which are based on interest, which is prohibited under Islamic law.<sup>19</sup> Moreover, apart from having to pay banking fees, contractors must prove they have suffered from delay in payment in order for the Board to remedy their loss.<sup>20</sup> However, some public agencies recognise that the cause of delay is related to the public agency and the contractor unjustly suffers from such delay, therefore, they extend the contract automatically as one method of compensation and sometimes exempt the delay fine, even if the cause of delay is not related to the late payment.<sup>21</sup>

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<sup>19</sup> Case no. 1536/1/K dated 1418 AH (1998). see p.273 in this Chapter for more details.

<sup>20</sup> Case no. 1206/1/K dated 1417 AH (1997) and Case no. 421/1/K dated 1412 AH (1992).

<sup>21</sup> National Commercial Bank, *Government Contracts Open up New Prospects for the Saudi Construction Sector*, February 2003, Issue 1, Vol. 13, p. 7.

**C. Reasons for late payment**

In order to find solutions to remedy the failure of the contracting authority to satisfy its contractual obligations to pay a contractor within the due time, and to protect the right of the contractor when the contracting authority delays his payment, it is necessary to analyse some issues related to the public budget phase, even if this study's main intention is to explore the right of tenderers and contractors under public contract regulations.

One may ascribe late payment to two reasons: financial procedures and insufficient funds.

**1. Financial procedures**

In general, many regulations in the country prevent public agencies from making procurement contracts if they do not have sufficient money to cover the contract amount. The Basic Law of the Government states that "no obligation should be made to pay funds from the state treasury except in accordance with the provisions of the budget. Should the provision of the budget not suffice for paying such funds, a royal decree must be issued for their payment".<sup>22</sup>

Thus, public agencies should not deal with private contractors if they do not have the contract amount already available before signing the contract. Moreover, the nature or the subject of some contracts requires public agencies to obtain advance approval before contracting. Loan contracts, for example, must have advance approval from the Council of

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<sup>22</sup> Basic Law of the Government, Royal Decree no. A/ 90 dated 27/8/1412 AH (1992), Art. 73.

Ministers.<sup>23</sup> In addition, the Council of Ministers must approve any contract whose amount exceeds 100 million Saudi Riyals.<sup>24</sup> Finally, public agencies must send the draft of any contract to the Finance Ministry for review to make sure there is enough money to cover the price of the contract if the period of the contract exceeds one year.<sup>25</sup>

One may notice that some of the above contracts must be approved by the highest authority in the country in order to protect the public budget. Nevertheless, many contractors suffer from late payment. Even if the Financial Ministry has reviewed and approved procurement contracts which exceed one year, which means that the price of the contract is available, contractors still may not receive their financial rights on time. The reason behind this is the bureaucratic procedures of the public budget.

According to these procedures, each public agency should have a current account book for the Ministry of Finance.<sup>26</sup> A public agency should prepare a financial report that includes the performance amount of each contract, or monthly instalment. It should send the original to the Finance Ministry, and a copy to the General Audit Bureau, and keep a second copy itself.<sup>27</sup> The main reason for the delay occurs from the period between sending the bill to the Finance Ministry and its being returned, together with the bill amount, to the public agency. The Board holds that 30 days is a

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<sup>23</sup> Council of Ministers Act, Royal Decree no. A/ 13 dated 3/3/1413 AH (1993), Art. 25.

<sup>24</sup> Royal Order no. 1708/3 dated 11/2/1405 AH (1985).

<sup>25</sup> Council of Ministers Decision no. 335 dated 27/3/1388 AH (1968).

<sup>26</sup> Y. Al-Saloom, *Budgetary Development in the Public Sector in Saudi Arabia* (Riyadh, Institution of Public Administration, 1986), p. 25.

<sup>27</sup> M. Algaith, "Central Financial Control", in M. Al-Tawail (ed.) *Public Administration in the Kingdom of Saudi Arabia* (Riyadh, Institution of Public Administration, 1986), pp. 221-250.

sufficient and reasonable time for the Finance Ministry to review and pay the bill.<sup>28</sup>

Delaying the financial rights of contractors is one of the main problems that may face them during the execution of the contract. In one contract, for instance, the Finance Ministry delayed for more than 436 days.<sup>29</sup>

It is worth mentioning that delay is caused not only by the public agency or Finance Ministry, but also by the contractor involved. Before paying the contractor, many conditions, as mentioned above, must be satisfied and documents submitted with the contractor's bills. For example, if the contractor does not send a copy of his *Zakaht*<sup>30</sup> or Tax certificate, the public authority will wait until he fulfils this requirement.

In fact, bureaucratic routine is one of several reasons for the lateness of payment. The Finance Ministry withholds from public agencies the power to pay their contractors. Although they have the power to contract, they do not have any authority to control the payment of the contract. In fact, contractors are the losers in this situation.

In the long term, this policy will affect the trust of contractors in public agencies. It is unacceptable that one agency deals with a private firm, yet another must pay him or authorise payment of his financial rights. It is submitted that the public agency should have full responsibility for the performance, payment and control of the contract. The role of the Finance Ministry should come only after the performance of the contract. In other

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<sup>28</sup> Case no. 1190 /1/ K dated 1419 AH (1999). If the payment procedure exceeds 30 days, the contractor, in general, has the right to compensation. See p. 311 below for details.

<sup>29</sup> Case no. 866 /1/ K dated 1406 AH (1986).

<sup>30</sup> More details about *Zakaht* are provided in Footnote 15 in this Chapter.



words, the Finance Ministry should not have a direct relationship with the parties to the contract. It should only ensure that the contracting authority spends the contract amount to provide public services.

## **2. Insufficient funds**

As mentioned above, public agencies are required not to contract if there are insufficient funds to cover the contract price. In fact, this problem is likely to arise in long term contracts, in other words, contracts which last for more than one year.

In practice, the Finance Ministry sends the budget call circular to all public agencies. The agencies then begin to prepare their budgets according to this circular. Preparation includes estimation of the following year's expenditures and revenues.<sup>31</sup> After the budget is prepared it is sent to the Council of Ministers for approval. The Finance Ministry then allocates a separate budget to each ministry. Each minister is responsible for allocating available funds to agencies and projects under his supervision, in accordance with the Royal Order instructions governing the budget. The Finance Ministry follows a policy of spending tightening by preventing public agencies from allocating funds to another or new projects.<sup>32</sup> It is also obligatory for each Ministry to report to it whenever expenditure has exceeded its estimated value. Ministries are not allowed to use such surpluses before obtaining prior

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<sup>31</sup> The Financial Rules and Regulations of the Finance Ministry of 1967 are issued every year with slight differences to control public spending. Ministries have no power to allocate funds from one project to another without permission from the Finance Ministry. It should be noted that the period of procurement contracts may extend one to three years. The contracting authority should send its estimation for long period projects to the Finance Ministry which should take it into account when preparing the budget for the second and third year of the contract.

<sup>32</sup> *Ibid.* After the Gulf War of 1990, no public budget was issued, and because of the public budget deficit of more than 140 billion Saudi Riyals, the Finance Ministry's control covers not only ministries but also State Owned Enterprises.

approval from the Minister of Finance. It has been suggested<sup>33</sup> that some flexibility should be allowed regarding the treatment of year-end surpluses and deficits by defining how, and to what extent, they may be carried over into the next fiscal year. Agencies would thus be in a better position to plan on a long-term basis, instead of being compelled to spend available funds under an end-of-year deadline. Overspending, however, can be transferred as debt to the following fiscal year, with a consequent reduction in disposable funds.

The problem of the lateness of payment arises when the budget fund of the public agency does not cover the second or third year of the contract. This may relate to the shortage of oil revenue, which the country relies on as the main source for the public budget. When a public authority contracts for more than one year, it expects the Finance Ministry to provide the amount needed, because it has to approve the contract before it becomes effective. If the agency's budget does not cover the amount in question, the agency should solve this problem by transferring an appropriate amount from other parts of the public budget. Although the public budget regulations currently prevent public agencies from transferring any amount from one part of the budget to another, agencies should protect the financial rights of the contractors and be pressured to pay them from other parts of the budget.

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<sup>33</sup> National Commercial Bank, *Impact of Higher Oil Prices on the Saudi Construction Sector*, First October 17, 2003, Issue 31, Vol. 13, p. 5.

It is worth mentioning that the long practice of late payment has forced private contractors to find ways to cope with this problem.<sup>34</sup> In order to avoid bankruptcy and to protect their firms and their continued viability in the market, they have adopted various practices to cope with the late payment issue. In fact, most of them overestimate their contract prices. Moreover, when procurement officers negotiate with them to reduce their prices, they may be willing to do so on receiving a guarantee that their payment will be paid on time. The government knows that tender prices are overestimated in many contracts. Contractors use this as a way to compensate themselves for any damage caused by late payment. Because of this practice, the Saudi Public Works Standard Contract<sup>35</sup> in Article 43 allows the contracting authority to add or reduce the price of the procurement contract by 20 per cent of its value.<sup>36</sup>

Another private firms' practice to avoid the side effects of late payment is to use the same workers, equipment, transport, etc. to perform two contracts for two public agencies at the same time.<sup>37</sup> Although this solution is contrary to the provisions of the Purchasing Law and procurement contracts, sometimes public agencies allow such practice if the reports of work progress are satisfactory. In practice, this solution affects the performance of the

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<sup>34</sup> Saudi Chambers of Commerce, *The Finance Difficulties which Face Saudi Contractors*. Working paper produced at the Saudi Contractors' Annual Meeting, Saudi Chambers of Commerce, Riyadh, 10/2/2001.

<sup>35</sup> Public Works Contract Standard, *supra* n.10, Art. 43.

<sup>36</sup> For example, King Saud University usually reduces its procurement contracts valued at more than 5 million Saudi Riyals by 20% directly after such contracts are signed.

<sup>37</sup> Riyadh Chamber of Commerce, *Barriers and Obstacles which face Procurement Contractors*, A paper submitted by the Riyadh Chamber of Commerce, October 2002, p. 11. This working paper showed that some contractors sign two procurement contracts with two public agencies. For example, to maintain and operate office equipment for two different public agencies, they provide a certain number of workers and during the performance of the contract they order them to work certain days with one agency and different days with the other agency.

contract and always delays the completion of the work, which leads the contracting authority to penalise the contractor for such delay.

The third practice, which has a negative influence on the development of procurement firms, is to obtain financial loans from commercial banks.<sup>38</sup> Commercial banks always hesitate to lend to procurement firms because the government does not pay them on time, which affects the interest rate of loans.<sup>39</sup> When they lend to private firms, commercial banks stipulate a high rate and harsh conditions before paying loans, in order to safeguard their rights. In fact, this practice adds additional costs to the contractor, and may reduce or eliminate his profits.

It is submitted that contractors should have a security against late payment in order to protect their rights and to develop the procurement market. The government might contract with commercial banks or insurance companies to pay contractors on its behalf, and then commercial banks might obtain their monies from the government, either by "government bonds", "*Sandat AL-Khazinah*", or when such monies become available to the government. In addition, it is recommended that contractors stipulate in their procurement contracts liquidated damages to secure payment.

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<sup>38</sup> A. Al-Shomaimeri, *The Impact of Marketing in Small and Medium Enterprises*, paper presented to the Conference on the Problems of Small Firms, Riyadh Chamber of Commerce, December 2002, p. 9.

<sup>39</sup> Barriers and Obstacles which face Procurement Contractors, *supra* n. 37, p. 28.

**D. The contractor's right to suspend the work**

Is it permissible for a contractor to suspend the performance of the contract if the public authority fails to pay him?

The power of the contractor to suspend the performance of the contract is derived from the power to modify or terminate the contract. It was mentioned in chapter two that the parties to the contract have unequal power. The government, or the strong party, has the right to suspend, terminate and modify the contract. The contractor, on the other hand, has no power to take any such action without prior approval from the court. This policy is derived from the doctrine of public contract which gives the public authority powers and rights not common in private contracts. In brief, the contractor has no right to suspend the performance of the contract by his own decision. This accords with the suspension regulations in the Purchasing Law and the Saudi Public Works Standard Contracts and some judgements of the Board. Article 29 of the Implementing Regulation states:

"Both the public authority and the contractor shall perform the contract according to its conditions. If the contractor defaults in performing the contract, the public authority may send notice to him to remedy the situation but, if after fifteen days from the notice he has failed to so remedy, the authority may itself perform the contract at his expense or may rescind the contract. If the public authority fails to carry out its commitments, the contractor may after sending a notice letter requiring the authority to perform its part of the contract within fifteen days, take action against the public authority for damages, but the contractor may not refuse to perform the

contract on the grounds that the public authority has failed to perform its commitments".<sup>40</sup>

This Article describes the balance of powers between the parties in Saudi procurement contracts. Suspension, termination, and modification of the contract are given to one party, the government, which has the power to apply them according to its own decision after the elapse of fifteen days from its letter of warning to the contractor. However, the other party, the contractor, has no right to suspend, rescind, terminate or modify the contract if the first party, the public authority, does not perform its commitments. Although the contracting authority has the right to penalise the contractor, the contractor cannot himself impose penalties upon the public authority. He must follow certain procedures different from those which govern penalties against him. In fact, he has to seek compensation through the court.

The condition of sending a warning letter to the contracting authority, requesting it to keep its promises, is only evidence to the court that the contractor has tried to get the authority to perform in good faith. Such a warning does not give the contractor any legal justification to suspend the contract.

In addition to article 29 of the Implementing Regulation, Article 59 of the Public Works Contract contains an even less favourable regulation. It prevents contractors from requesting any compensation if they do not send a letter of request within 30 days of late payment. Therefore, the contractor is required, besides the warning letter complaining of the delay in payment, to

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<sup>40</sup> Implementation of Purchasing Regulations (Implementing Regulations), Ministerial Decision no. 17/2131 dated 5/5/1397 AH (1979), Art. 29.

send letters every time the authority delays paying him. In fact, this regulation treats the contractor as if he were the one who had breached his commitment.

According to these articles, the contractor has no right to suspend the work, even if the public authority breaches its contractual obligations. The Board has adopted this view in many of its judgements and prevented the contractor from suspending the performance of the contract, even if the contracting authority has not paid him.<sup>41</sup>

Analysing the letter of warning that should be sent by the aggrieved party shows that it has two kinds of influence. In practice, when one of the parties uses a warning letter, this means the performance of the contract has faced some difficulties and one of the parties has failed to satisfy his part of the contract. When it is used by the public authority it has direct influence over the other party, the contractor. The authority has the right, after the elapse of fifteen days, to penalise the contractor if he does not implement the subject of the warning. If the warning is sent by the contractor, in contrast, he has no power to penalise the contracting authority after the elapse of the warning period if no payment is forthcoming. For example, if the contractor warns the contracting authority that he will suspend the contract unless it pays him within fifteen days, he cannot suspend after the fifteen days have elapsed. He must obtain a judgement from the Board to suspend before implementing his warning. The difference here is that the contracting authority has direct influence over the contractor once the time of warning

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<sup>41</sup> *Case no. 591/1/K dated 1416 AH (1995), Case no. 33/T dated 1401 AH (1981), and Case no. 1190/1/K dated 1419 AH (1999).*

has elapsed, while the contractor uses this warning as a legal instrument to prove that the contracting authority has breached its commitments, which may help him when he requests compensation. Such treatment makes contractors dissatisfied with dealing with the government and leads them to seek means, whether legal or illegal, to protect their rights and avoid penalisation by the public agency.

The right of suspension should be available to the contractor once the government fails to satisfy its commitments. It is very important that law-makers should give serious consideration to the stability of the procurement market and the development of the procurement sector. They should undertake scientific investigations into the weakness of the contractual obligations in procurement contracts in order to obtain the real facts before taking any decisions regarding procurement. It is also recommended that the General Audit Office should analyse the accountability of procurement during the last three decades to support the strengths and to avoid the weaknesses of the sector. To-date, however, in spite of the large number of cases relating to late payment, the Board has not adopted or created a general principle about such cases. It has three approaches regarding lateness of payment: not to compensate the contractor, to extend the period of the contract, and to issue an exemption from the delay fine. These approaches will be discussed later.

The long practice of late payment raises a question about an effective way to avoid such lateness. It should be recognised that one reason behind such delay is the fluctuation in oil prices which always affects the



government's commitments. Therefore, the government should find additional financial sources for its procurement contracts in order to reduce dependence on the public budget.

### **E. Board Decisions regarding late payment**

The Board has three approaches regarding the lateness of payment: not to compensate the contractor, to extend the period of the contract, and to give an exemption from the delay fine. An illustration may aid in making these approaches clear.

#### **1- Not to compensate the contractor**

If the contractor claims delay under the contract, the Board may take upon itself the responsibility for assessing any negative impact of the delay on the contractor and decide whether to compensate him in order to remedy his loss (see paragraphs 2&3 of this section).

In some cases the Board has refused to give compensation to the contractor to cover the failure of the government due to the contractor's failure to prove detriment from lateness of payment. The Board requires the contractor to provide evidence of detriment to him in order to obtain remedy. In general, thirty days is considered an acceptable time period within which the contractor's bills should be paid.<sup>42</sup> Any bills not paid after thirty days are viewed as delayed and the contractor is entitled to remedy for such delay. However, the Board has shown a different view. It held in one case that the public agency's delay of 60 days to pay bill no. 4, 150 days for bills no. 13

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<sup>42</sup> Case no. 1190/1/K dated 1419 AH (1999).

and 14, 240 days for bills no. 16 and 17, and 300 days for bills no. 13, 14 and 15, was a breach of contract and the contractor should receive compensation if he could prove detriment for such delay. However, the contractor was unable to obtain compensation because he "was unable to prove he had suffered from such delay".<sup>43</sup> In spite of additional costs incurred by the contractor, delay in performance, and bank loans the contractor had to obtain to continue the performance of the contract, the Board ignored all these factors and decided that ten months' delay in payment was not a sufficient reason for the contractor to receive compensation.

In contrast, unlike Saudi practice, detriment is presumed under UK practice once the contracting authority breaches its contractual obligations. Accordingly, there is no requirement for contractors to prove their detriment if the contracting authority delays their contractual payment. It was held in *Draper v. Trist*<sup>44</sup> that the law assumes, or presumes, that, if the goodwill of a man's business has been forfeited by the passing off of poor quality goods and the damages resulting therefrom ... it is one of the class of cases in which the law presumes that the plaintiff has suffered damage.

The Board's decision not to compensate the contractor for the contracting authority's long delay in paying a contractor is criticised for many reasons. Firstly, because damage to the contractor is presumed from such delay because contractors have to pay workers, buy equipment etc. and their budget is based on anticipated receipt of monthly financial instalments for performing their contractual obligations. Secondly, the Board appears to

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<sup>43</sup> Case no. 866/1/K dated 1406 AH (1986).

<sup>44</sup> *Draper v. Trist* [1939] 2 ALL E.R 513 (C.A.).

concentrates only on the detriment to the contractor and does not take into consideration the benefit the public authority gains from the work performed. The public authority's wealth is increased with every passing day the project work is execution of. In a supply contract, for example, the public authority benefits from the goods received but delayed payment to the contractor of the price of good received may prevent him from buying new goods.

In any contract, delayed payment will lead ultimately to some increase in head-office administrative costs, for example, extra staff efforts may be required to deal with problems caused by the delay in payment, such as the need to borrow money, re-costing performance plans, etc. Where this occurs, the costs should be readily ascertainable.

## **2- Exemption from the delay fine**

It is common practice in procurement contracts to request the contractor to fulfil his commitments within the time specified in the contract. Usually, procurement contracts contain a delay fine to encourage the contractor to speed up his performance. If the time agreed expires before the work is completed, the contractor will be subject to such a fine. Article 9(a) states that "the contractor will be subject to a delay fine not more than 10 per cent of the value of the public works contract".<sup>45</sup> The percentage is different in supply and maintenance contracts. The fine must not exceed 4 per cent of the value of the contract.<sup>46</sup> In practice, delays in payment cause delay in

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<sup>45</sup> Purchasing Law, *supra* n. 6, Art. 9 (a).

<sup>46</sup> *Ibid*, Art. 9 (b).

completion.<sup>47</sup> When the contractor sets out his performance plan he relies on the schedule of payment to help him finish the work on time. Once one of his invoices is delayed, this will affect, either directly or indirectly, his performance. He, then, will try to solve this problem in order to continue his performance. But when the authority delays ten months or so, as in the example cited in the previous section, this will have a serious impact on the progress of the work, especially if he has contracted to complete his work within one year. Thus, he will not finish his work on time, which will lead the contracting authority to apply the delay fine. In this respect, the Board recognises that the contracting authority, by delaying the payment to the contractor, has been largely responsible for the delay in completion. Therefore, it may refuse the decision of the contracting authority to penalise the contractor and exempt him from such a fine. It thus agrees that the lateness of payment has led to the change in the performance plan and contributed to the contractor's inability to finish the contract on the due date. Therefore, the decision of the public authority to apply the delay fine is not fair or just, and must be overturned.<sup>48</sup>

### **3- Extension of the contract period**

The third remedy of the Board is to extend the period of the contract if the delay of performance is caused by late payment. In fact, as mentioned above, late payment is a strong defence for the contractor to justify his failure

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<sup>47</sup> Jeddah Chamber of Commerce, *The Difficulties that Face Contractors on Financing their projects*, a paper presented to the first meeting of the Contractors' Committee of the Saudi Chamber of Commerce, Jeddah Chamber of Commerce, 10 Feb. 2001, p.8.

<sup>48</sup> Case no. 303/31/K dated 1418 AH (1998), Case no. 1206/1/K dated 1417 AH (1997), and Case no. 304/1/K dated 1406 AH (1986).

to complete on time. However, not every case of late payment attains this result. The contractor must prove causation between the delay in payment and the delay of performance. If the Board is satisfied with this excuse, the contractor will win the case; otherwise he will not enjoy any extension of the period of the contract.

Two important points need to be raised; the first is related to the extension and the delay fine and the second concerns the measures of the Board regarding compensation as a consequence of the lateness of payment.

First, the previous section discussed exemption from the delay fine because of the delayed payment. Here, we have two results, one related to the delay fine and the other related to the extension of the contract. In fact, the delay fine has a direct relation with the extension of the contract, or in other words, it is subject to the extension of the contract. If the contractor does not complete his work within the agreed period, he will be subject to a financial fine. When the Board distinguishes between the extension of the contract and the exemption from the fine, it recognises that the extension may happen for reasons other than the lateness of payment. In addition, the exemption from the delay fine may not provide sufficient compensation for the negligence of the public authority. Therefore, the extension of the contract may cover the loss of the contractor more than the amount of the delay fine.

Second, the Board has no clear measures to follow when deciding when a contractor deserves compensation. In one case, the Board agreed that a delay of 300 days was good reason to compensate the contractor if he

could prove he had suffered from the lateness of payment. However, the Board did not accept the explanations of the contractor and refused to give him any remedy regarding such delay.<sup>49</sup> In another case, the Board awarded judgement in favour of the contractor because the public authority had delayed more than 30 days to pay his bills and held that thirty days was enough time for the public authority to process the contractor's invoices.<sup>50</sup> No justification was requested from the contractor, because the Board focused on the period of preparing the bills, not on the damage to the contractor. Implicitly, the Board held that the suffering of the contractor occurred immediately from where he did not receive his financial payment in the normal period.

There has been a debate between the Board and the Finance Ministry<sup>51</sup> regarding when the date of the bill starts; is it from the date of requesting payment by the contractor or the date of receiving such a request by the Finance Ministry? The Finance Ministry argued that the date should start from when the Ministry receives the bill because it may take more than 30 days to prepare and pay such a bill.<sup>52</sup> It has its own calculation to account the delay period. It instructs public agencies to apply the following equation:

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<sup>49</sup> Case no. 304/1/K dated 1406 AH (1986).

<sup>50</sup> Case no. 1190/1/K dated 1419 AH (1999).

<sup>51</sup> *Ibid.*

<sup>52</sup> In 1998, construction contractors dealing with the Ministry of Education were suffering from delay of payment. Although the Ministry's failure to pay them was deemed a material breach and justification for them to refuse to continue to proceed, they requested the Ministry to allow them to suspend the performance of the contract, or to extend the period of the contract, or to waive the fine for delay in performance [letter no. 39/1/5/1757 / 13 dated 10/8/1418 (1998) and letter no. 39/2122/266/13 dated 6/2/1419 (1999)]. Long and difficult negotiations took place in the Education Ministry which resulted in an extension of the period of the contract after the delay in payment under three conditions:

1. The amount delayed must not be less than 5% of the value of the contract. 2. The delay period must not be less than 60 days from the date of the bill, and 3. The delay must occur before the date specified to complete the contract. The Education Ministry sent the result of the negotiation to the Finance Ministry, the Finance refused it and sent a circular to the Education Ministry to ignore such outcome

$$\text{The delay period} = \frac{\text{the value of the bill}}{\text{the value of the contract}} \times \text{the delay period from when the Finance Ministry received the bill} - 30 \text{ days}$$

The Board refused such argument holding that the Finance Ministry is an external party and has no direct relation with the contractor. In addition, it held that financial procedures usually start from when the contractor requests the contracting authority to pay his bill. Therefore, the period for preparing such a bill must start directly when the contractor requests his payment.<sup>53</sup>

**F. The prohibition against interest**

It is worth mentioning that obtaining financial interest is an important difference in remedy for late payment between UK and Saudi regulations. This remedy, which is legal under UK regulations, is completely prohibited under Saudi law. The Board, as explained below, never supports any claim for obtaining interest, either for late payment or as compensation to remedy a loss of profits.<sup>54</sup>

This section will analyse this issue under Saudi law and it will later be discussed when analysing late payment under UK regulations.

In general, Islam prohibits interest or *Riba* (usury).<sup>55</sup> The literal translation of the Arabic word *Riba* is increase, excess or surplus. According to

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and calculate the delay from the day that the Finance receives a bill for payment.[Finance Ministry circular no. Circular no. 8/2/11837 dated 15/3/1420 AH, and Education Ministry decision no. 2094 dated 6/7/1419 AH (1999)].

<sup>53</sup> Case no. 1165/1/K dated 1418 AH (1998), Case no. 4/D/1/1 dated 1419 AH (1999), Case no. 423/1/K dated 1413 AH (1993), and Case no. 1206/1/K dated 1417 AH (1997).

<sup>54</sup> Case no. 1536/1/K dated 1418 AH (1998).

<sup>55</sup> Generally, *Riba* is subdivided into two main types; the first is *riba al-fadl* in which an excess amount accrues in one of the countervalues (for example, lending 1 kilogram of sugar and stipulating that it should be returned as 1.25 kilograms). In this context, items sharing the same type and belonging to the same species and classification must not be exchanged with any disparity in the countervalues. The second is *riba al-nasi'a*, which refers to delaying (or deferring) the transfer of the delivery of one of the countervalues, with or without excess. The Prophet is quoted to have said: ‘Gold for gold, silver for

the *Quran*, charging interest amounts to the declaring of war against God and God's Messenger. Allah, the Almighty, says in the Holy *Quran*: "*O You who believe, fear God and give up what remains of your claims of Riba if you are truly believers. If you do not, then take notice of war from God and His Messenger*".<sup>56</sup> Moreover, according to the *Sunnah*, the traditions of the Prophet Mohammed (Peace be Upon Him), *Riba* is a criminal and sinful act worse than adultery.

According to Sidiqi, the main reason why Islam prohibits interest is that it involves oppression (*zulm*) and exploitation; guaranteed return to capital is unjust in view of the uncertainty surrounding entrepreneurial profits.<sup>57</sup> In procurement, it will increase the contract price by causing a fixed amount to be paid in excess of the agreed price. Thus, the government will pay more than the value of what it has received from the contractor. Because of the prohibition on interest, the Board never accedes to litigators' demand for remedy due to their fear of loss or hope of gain.<sup>58</sup>

However, it should be noted that although interest is prohibited by Islamic Sharia'h, it is adopted by most commercial banks in Saudi Arabia. In fact, most commercial banks in the country apply Western-style-banking practices, including interest, in the commercial life of the country. One can find no regulations regulating the interest, but daily commercial banking

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silver, wheat for wheat, barely for barely, dates for dates, and salt for salt. Like for like, exchanged equal for equal, measure for measure, and hand-to-hand [i.e. on the spot]. If anyone gives more or asks for more they have dealt in *riba*. The receiver and the giver are equally guilty'. See L. Al-Rimawi, Middle East: Islamic Models of Equity Markets, *Company Lawyer*, Vol. 21, no. 5, p. 161. and R. Klarmann, Construction and Lease Finance in Islamic Project Finance, *Journal of International Banking Law and Regulation*, 2004, Vol. 19, no. 3, pp. 61-67.

<sup>56</sup> The Holy Quran, Chapter 2, verse 278.

<sup>57</sup> Dr. M. Sidiqi, Muslim Economic Thinking: A Survey of Contemporary Literature, Chapter 10 of Studies in Islamic Economics, Edited by K. Ahmed, (Leicester, the Islamic Foundation, 1980), p. 64.

<sup>58</sup> Case no. 1206/1/K dated 1417 AH (1997) and Case no. 421/1/K dated 1412 AH (1992).



transactions, especially loans, letters of credit, guarantees and bills of acceptance, apply interest as banking fees. In the early years of the foundation of the country, King Abudlaziz, the founder, issued a royal decree for the Bin Mahfouz and Kaki families to establish local banks. Their licences were conditional on the banks operating in a way acceptable to the majority of the Muslim faithful,<sup>59</sup> in other words, avoiding interest payments or receipts. They established the National Commercial Bank, charged fees for services, and provided current accounts for customers on which no interest was paid. Lines of credit had to be agreed in advance, and according to the prescribed Quranic rules on just trading practice. The Sharia'h law would apply to banking in Saudi Arabia, as it was this that governed all commercial practice.<sup>60</sup> Later on, the government allowed foreign banks to have local partners dominated by Western experts. The main business of these banks continued to focus on financing foreign trade by overdrafts, packing credits, commercial trade bills, and foreign transactions. Consequently, they transferred Western banking systems to the country, including interest. When national courts refused to apply interest and other banking transactions contrary to Islamic rules, the government established a special committee, the Monetary Committee, with jurisdiction over the banking disputes.<sup>61</sup>

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<sup>59</sup> R. Wilson, the Evaluation of the Saudi Banking System and its Relationship with Bahrain, in Tim Niblock (ed.), *State, Society and Economy in Saudi Arabia*, Groom Helm, London, 1987, at 280- 281.

<sup>60</sup> R. Wilson, Islamic Banking and its Impact on the International Financial Scene, 1995, *Journal of International Banking Law*, vol. 10, p. 438.

<sup>61</sup> In 1987, the Council of Ministers issued its decision no. 8/729 dated 10/7/1407 AH to establish a Banking Dispute Committee as a quasi court to handle dispute between banks and their customers. All banking disputes had to be referred to this Committee and the rulings of this Committee were given the same enforcement support as decisions from any other court. For details see Saudi Arabian Monetary Agency, *A Case Study on Globalization and the Role of Institution Building in the Financial Sector in Saudi Arabia*, February 2004, p. 7.

## II. Payment under UK procurement contract regulations

### Preamble

Payment is the lifeblood<sup>62</sup> of procurement contractors. The first and immediate aim of private contractors is to seek profits from their business. They require payment when they perform or after delivery. It has been held that “cash flow” is vital to the contractor and delay in paying him for the work he does naturally results in the ordinary course of events in his being short of working capital, having to borrow capital to pay wages and hire charges, and locking up in plant, labour and materials capital which he would have invested elsewhere.<sup>63</sup>

Public agencies have no right to contract if their budgets do not have sufficient money to cover the price of the contract.<sup>64</sup> In fact, this rule derived from the leading case *Churchward v R*<sup>65</sup> which described the monetary liability of the Crown in contract. It stipulated that a contract is invalid unless payment due under the contract is expressly provided by Parliament. Accordingly, if the contract expressly stipulates that payments are conditional upon the consent of Parliament, the Crown is not liable if Parliament does not give its consent to payment. However, the principle of this rule was rejected by the High Court of Australia.<sup>66</sup> The Court distinguished between the contractual obligations of the parties to the contract and the prior consent which the public agency should obtain from parliament before entering into

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<sup>62</sup> *Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* (1973) 1 B.L.R. 72 (HL), Lord Diplock at 94.

<sup>63</sup> *F G Minter Ltd. V. Welsh Health Technical Service Organisation*, (1980).

<sup>64</sup> J. Budding, Head of the Procurement Section in the National Assembly of Wales, Interviewed, Monday 23<sup>rd</sup> of May, 2004.

<sup>65</sup> *Churchward v. R* (1865) LR 1 QB 173.

<sup>66</sup> *New South Wells v. Bardolph* (1934) 52 CLR 455.

the contract. It held that “the prior provision of funds by Parliament is not a condition preliminary to the obligation of the contract”.<sup>67</sup> However, the contracting authority itself is responsible for ensuring its budget covers the contract price.

As mentioned in chapters one and two, although this thesis focuses primarily on the rights of tenderers and contractors in public contracts, it is necessary to sometimes explore other regulations. Accordingly, the budget phase of the constructional law of the UK will be examined in order to assist understanding of the contractor’s right to receive payment and to explore reasons for the delay of payment to contractors. This issue is in fact clearer under the Saudi system than the UK system because Saudi public agencies are obliged to contact the Finance Ministry before they pay contractors, even though the Finance Ministry, as mentioned above, has no direct relationship with contractors.

The UK Treasury is the main department responsible for allocating finance to government departments, and has supervision and control of their spending.<sup>68</sup> Since 1963, following the Plowden Report<sup>69</sup> which recommended that any decision on public expenditure should be taken “in the light of a survey of public expenditure as a whole over a period of years, and in relation to prospective resources”, there has been an annual survey published, the Public Expenditure White Paper, which sets out the aims and objectives of government spending for three forthcoming financial years for central

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<sup>67</sup> *Ibid*, at 510.

<sup>68</sup> J. Alder, ‘*Constitutional and Administrative Law*’ (Palgrave Macmillan, 5<sup>th</sup> Ed, 2005), p. 328.

<sup>69</sup> Plowden Report, Cmnd.1432.

government departments and local government.<sup>70</sup> The Treasury's annual Public Expenditure Survey (PES) is the central factor in planning and controlling public expenditure. The Public Expenditure White Paper comprises two volumes, Volumes I and II, which outline general spending policies of the government and provide statistical information on aggregated departmental spending.<sup>71</sup> Public agencies are obliged to contract with their budget constraints which means they should refrain from entering into any public contract beyond their budget capacity. Thus, it is obvious that if the public agency has sufficient money to cover a public contract it should pay a contractor once he submits his bills, provided there is no reservation regarding the contractor's performance of the contract.

Importantly, the contract law of England and Wales, Scotland and Ireland regulates the right of contractors in the case of late payment. They can suspend performance of the work and obtain remedy since the terms and conditions of the procurement contract will have been breached.

Further, there are many standard construction contract forms issued by public and local authorities for both building and civil engineering work, which contain detailed provisions relating to late payment, such as the right of contractors to suspend the work, or to obtain compensation for such delay. The most popular standard contract forms are those of the Joint Contracts Tribunal (JCT 98), the Institution of Civil Engineers (ICE 6<sup>th</sup> ed.), *the Federation International des Ingenieurs Conseils* (FIDIC), and the Property Service Agency known as GC/Works/1. It is not this study's aim to analyse at

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<sup>70</sup> J. McEidowney, 'Public Law', (London, Sweet & Maxwell, 2<sup>nd</sup> Ed, 2002), p. 334.

<sup>71</sup> Ibid. p. 342.

length these types of procurement contracts, but attention is drawn to the right of the contractor to obtain payment and the impact of delayed payment on the contractor.

### **A. The Problem of late payment**

Late payment is in fact common practice. It is rare to find a contracting authority which pays its financial obligations on time. This is because financial procedures are complex and governments are not scrupulous about payment. UK contractors, like Saudi contractors, suffer from lateness of payment.<sup>72</sup> It is a serious problem for UK contractors especially small firms. "Research estimates that a quarter of 40,000 businesses, procurement and non procurement, collapse each year as a result of late payment".<sup>73</sup> In addition, the National Joint Consultative Committee for Building in England (NJCC) is very concerned about the substantial delays which frequently occur in the payment of outstanding monies under building contracts and subcontracts, and the cash flow problems which these create throughout industry. It has been estimated that the total of sums due to be paid, but which are unpaid to contractors, sub-contractors, suppliers and professionals advisers at any given point in time amount to several hundreds of million of pounds; the heavy burden of additional costs of financing this sum limits cash and turnover, and

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<sup>72</sup> The UK government recognises that late payment in private transaction is a serious problem for small businesses and is committed to tackling it. With the aim of promoting a "Prompt Payment Culture" the Department of Trade and Industry (DTI) supports prompt payment and, accordingly, the British Standard on Prompt Payment published in February 1995 is a regulation for "Tackling Late Payment" and resolving the problems of delay in paying a contractor or a consumer. For more details see S. Sheikh, Contract: Late Payment of Debts, *International Company and Commercial Law Review*, 1995, p. 145.

<sup>73</sup> Small Firms Receive Help in their Fight against Late Payment, Small Business Service, Press Release on 1 Nov., 2000.

inevitably and unnecessarily increases the cost of building.<sup>74</sup> Consequently, a survey conducted by the Building Industries Association (BIA) found that "100 per cent of the people contacted who were involved in school-building projects had problems with late payment".<sup>75</sup>

It is usual practice for the public authority to evaluate the performance of the contractor before paying. Such evaluation is subject to the method of payment. If it is monthly, then the evaluation must be undertaken monthly and must be certified as a requirement of payment. If the work is found to be satisfactory then payment procedures should start.

It is worth noting that monthly instalments have several advantages. In addition to specifying the amount of money which the contractor deserves to obtain as a result of his performance, they confirm that the contractor performed his obligations in a satisfactory manner. They also imply that the public authority has a measure of satisfaction with the progress of work, the goods received, or the service provided, since the contractor started his contract performance. Actually, the certificate of a financial payment is proof that the public authority has accepted the quality of the work. In practice, usually public agencies review and make sure that the execution of the work is according to the terms and conditions of the contract before issuing the final bill. Therefore, public agencies usually do not issue the final bill if the work is not satisfactory. As a result, the final certificate is a clear indication that the contractor has performed the work in a satisfactory manner. The real

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<sup>74</sup> R. Deventer, *"the Law of Construction Contracts"* (London, Chancery Law Publishing, 1993), p.117.

<sup>75</sup> Late Payment Causes Builders' Crisis, Building Industries Association, *Daily Dispatch* Correspondent, Friday, October 1997.

significance of this final certificate is that it binds the contracting authority and frees the contractor from any liability other than that for latent defects arising from the execution of the contract work.<sup>76</sup>

Additionally, if the contracting authority has accepted part of the work but the contractor fails to perform other parts or the performance of other parts is defective, the contractor has the right to be paid for the work accepted. The contracting authority is under obligation to pay him for the work done and to send him a warning notice to comply with the rest of the contract provisions. If the public authority decides to withhold any payment for any reason, it is responsible for notifying the contractor as to why it intends not to pay him. Conversely, if the contractor is not given such notice, the public authority has no right to withhold the payment.<sup>77</sup> In contrast, in Saudi practice, the public authority is under no obligation to notify the contractor that it intends not to pay him.

If the contracting authority terminates a procurement contract before the work is completed, then the contractor has the right to be paid for the work done.<sup>78</sup> In the same manner, a sub-contractor is entitled to payment for the work done if the main contractor terminates his contract before the completion of the work.

In general, there are many reasons for the delay of payment, some of them related to routine procedures and others related to different reasons, such as lack of financial resources, the contractor's failure to perform the

<sup>76</sup> R. Deventer, *supra* n. 74, p.125.

<sup>77</sup> *Northern Development (Cumbria) Ltd. v. J.&J. Nichol* (January 2000)

<sup>78</sup> *Canterbury Pipe Lines v. Christchurch Drainage* (1997) 16 B.L.R. 76.

work, or failure to produce some certificates requested by the contracting authority as a requirement of payment. However, one can summarise these as two main reasons: financial procedures and insufficient funds. In contrast to Saudi Arabia, only one, financial procedures, causes delayed payment in the UK. In practice, this decision protects procurement contractors and encourages them to trust in public agencies. In turn, this builds strong relations between private contractors and public agencies, especially small firms. Not only will the contractor have sufficient funds to continue his execution of the contract, but public authorities have the power to help the contractor if he faces financial problems during his performance of the work. Public agencies have the power to lend a contractor a certain sum of money in order to cope with his financial problems.<sup>79</sup> This power, like the advance payment, is deemed a loan, "a contractual loan", paid to assist the contractor to finance the project.<sup>80</sup> This power is lacking in Saudi public agencies. Neither procurement officers, nor members of the Examination Committee have the power to lend money to a contractor in order to help him remedy his financial problems. Financial procedures prevent them from doing so, which, in turn, affects the trust of contractors and restricts the flexibility of governmental procedures.

As previously mentioned, the main reason for delayed payment in the UK is related to bureaucratic procedures. Firstly, the type of payment depends on the terms and conditions of the contract. After the submission of a bill, the procurement manager is responsible for reviewing and confirming a work. If

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<sup>79</sup> J. Budding, *supra* n.64.

<sup>80</sup> *Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* *supra* n. 64.



he ratifies it, then he should issue an order to pay the amount agreed. Sometimes, because of the financial procedures, it takes longer than usual to pay a contractor.<sup>81</sup> In practice, 30 days<sup>82</sup> is sufficient time to review the work and confirm the bill. Article 8.1 of the Conditions of Contract for Services, applied by the National Assembly of Wales, states that: "unless otherwise stated in the Tender Document, payment will be due within 30 days of receipt and agreement of invoices for work completed to the satisfaction of the Client".<sup>83</sup>

**B. The contractor's right to suspend the work**<sup>84</sup>

Contractors who do not obtain their payment may try to stop the performance as a means of making the public authority pay them. The delay of payment may be deemed a fundamental breach, so as to justify the contractor refusing to continue his performance. In fact, suspension of work is a difficult decision. A contractor must have such right expressed in the contract. Without an express provision, the contractor may breach his obligations if he suspends the work. In this context, the High Court in *Channel Tunnel Group v. Balfour Beatty Construction Ltd*<sup>85</sup> prevented the contractors

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<sup>81</sup> P. Omar, Minimising Late Payment Risks for SMEs: A New European Initiative, *The International Company and Commercial Law Review*, 2001, p. 39.

<sup>82</sup> In fact, there is no standard measure for the public authority to review, ratify and pay the amount due. Standard forms of contract, especially construction, differ in this point. For example, clause 30.3.3 of the JCT requests the employer to pay the amount due within 14 days of issuance of the invoice. In addition, clause 69.1 requires the employer pay to the contractor the amount due within 28 days of the invoice.

<sup>83</sup> Conditions of Contract for Services, SCON 8, The National Assembly of Wales, June 2000, Art. 8.1

<sup>84</sup> In general, suspension of work is caused by one of these three factors: the contractor, the contracting authority or a third party, i.e. sub-contractor, natural event, etc. The contractor is liable if his suspension causes a delay or work defect. However, if the contracting authority suspends the work, the contractor and his sub-contractors are entitled to an extension of time in addition to compensation for damages.

<sup>85</sup> *Lubenham Fidelitys and Investment Co Ltd v. South Pembrokeshire DC* (1986) 33 B.L.R. 39.

from suspending the work. The plaintiff had issued a variation order for the construction of a cooling system for the tunnel. The parties entered into negotiations to fix a price for the cooling system but were unable to reach agreement. The contractors alleged that Eurotunnel, the plaintiff, was guilty of various breaches of contract, including failure to fix a reasonable and proper price for the cooling system as required by the contract, and such breach entitled them to suspend the work on the cooling system. The plaintiff commenced an action in the High Court for an interim injunction restraining the contractors from suspending the work and the court supported his request.

In practice, the parties to a procurement contract are required to send a warning letter to the defaulting party to ask him to comply with the terms of the contract. If he does not satisfy the conditions of the contract, the other party may take action to force him to do so. In addition to the warning letter, the contractor must have reasonable justification for commencing the suspension action in order for his decision to be legally upheld. In *Lumberman Fidelities Limited v. South Pembrokeshire Council*,<sup>86</sup> the contractor suspended all work on the grounds that the interim certificates were not correctly calculated in accordance with clause 30 of the JCT 98 conditions and he was entitled to terminate work due to non-payment. The employer sued him claiming wrongful suspension of the work by him and maintained he was entitled only to payment of the sum stated by the architect in the interim certificate. It was held by the Court of Appeal that the certificate contained an

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<sup>86</sup> *Lumberman Fidelities Limited v. South Pembrokeshire Council*, (1986) 33 B.L.R. 39.

error and that even though the architect had made a mistake, the employer was not obliged to pay more than the amount stated as due on the interim certificates. The contractor could dispute the architect's certificate and his remedy was to go to arbitration. But, the contractor was in breach of contract in suspending the work without reasonable cause and persisting with the suspension.

Some forms of construction contract contain clauses allowing main and subcontractors to suspend work if they do not get paid. Nominated sub-contractor Contract NSC/C, for example, allows a sub-contractor to suspend work 35 days after the issue of an interim certificate in respect of which the main contractor has not been paid or otherwise discharged his liability to the sub-contractor. The 35 day period has been stipulated to give the employer an opportunity to pay the main contractor directly if appropriate, and thus avoid the disruption of the sub-contractor's withdrawal. Before suspending work, the sub-contractor must give 14 days written notice to both the main contractor and the employer. In addition, clause 69.4 of the FIDIC form states that ... "the contractor may, if the employer fails to pay the contractor the amount due under any certificate of the Engineering within 28 days after the expiry of the time which payment is to be made ... after giving 28 days' prior notice to the Employer, suspend work or reduce the rate of work". This clause makes it clear that the contractor may threaten the public authority by using the powerful weapon of suspending the work if the contracting authority has delayed his payment.

It should be pointed out that there is an important difference between Saudi and UK practice regarding the ability of the parties of the contract to suspend the work. Usually, the forms of UK procurement contracts contain an express provision which clarifies, first, the legality of the suspension of the work, and, second, when the parties have the right to suspend the work. In fact, UK practice is flexible in allowing contractors to suspend the work. In contrast, the allowance of suspension differs completely under Saudi practice. Prohibition of the suspension of work is general practice in Saudi Arabia, permission to suspend the work is the exception. Usually, under Saudi practice, governmental circulars or instructions contain express provisions preventing private contractors from suspending the work without prior order from the court. Examining the right to suspend the work under the two systems shows more clearly how they determine the rights of private contractors. Under the UK system, procurement procedures are flexible, whereas under the Saudi system procurement procedures are more complex and less flexible.

**C. Interest**

Before completing this part, one should mention that in order to eradicate a culture of late payment in public and private business, the government issued The Late Payment Commercial Debts (Interest) Act in 1998 which was replaced in 2002.<sup>87</sup> The Interest Act states that interest shall be payable in respect of late payment. In addition, it is an implied term of every contract that interest is payable if sums are not paid on time. The Act

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<sup>87</sup> The Late Payment Commercial Debts (Interest) Act 2002, which came into force on 7<sup>th</sup> August 2002.

provisions apply to ... the activities of any government department or local or public authority.<sup>88</sup> Part of the activities of the government departments stated in the Act is ...a contract for the supply of goods or services...<sup>89</sup> Consequently, government departments should take into account the fact that they will be charged interest in addition to compensation for the detriment to the contractor if they do not pay him on time.

### **III. A comparative analysis**

Delayed payment presents a problem to the procurement business in Saudi Arabia and the United Kingdom. Contractors in both countries suffer from such delay. However, because the problem of delayed payment to contractors is going in the UK, its government and trade business representatives are working together to reduce its effect. In contrast, the delay problem has remained for more than two decades in Saudi Arabia without an effective solution.

In Saudi Arabia, there are two main reasons for such delay: insufficient funds and bureaucratic governmental procedures. In the UK, financial bureaucratic routine is the main reason for lateness of payment. If the two countries could achieve a flexible public management system, the delayed payment problem might be eliminated. In both countries, governmental procedures give public officers or employees power to review and ratify contractors' bills. Reform of public management practice might help to protect the rights of the contractors; for example, under Saudi regulations, the

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<sup>88</sup> *Ibid*, Section 2(1).

<sup>89</sup> *Ibid*. Section 2(1).

Finance Ministry has no active involvement in the procurement contract, however, it has the power to pay or withhold payment from contractors. At the same time, the contracting authority has no power over its power. If the Finance Ministry withholds or delays payment, the contracting authority has no other option but to wait until such payment is sent by the Finance Ministry. Reform of the public management will give the contracting authority sole power over the performance and payment of the contract. It will also control the power of the Finance Ministry. In fact, the Finance Ministry should act as a general auditor reviewing the performance of the contract, after completion of the contract not during the performance.

Moreover, under Saudi procedures, the public authority has no power to help or support contractors even if the cause of delayed payment is related to it, or the contractor suffers from such delay and his performance is made difficult. In contrast, some UK agencies have the right to support a contractor if he faces difficulty in performing his contract, especially small firms, even if the cause of this difficulty is related to the contractor not to the agency. This approach has many advantages to the contractor, the society and to the contracting authority. The contractor will have an opportunity to continue his performance and will avoid any risk that may arise from his shortage of funds. The society will also benefit if the contractor performs his contract, completes it, and makes it ready for its members to gain advantage from. Finally, the contracting authority will gain many advantages, such as benefiting from the project after its completion, being able to contract with another contractor, and helping the public by enabling them to benefit from the project if it is for

the society. Saudi public agencies should be given similar power to support contractors if they face problems during the performance. In fact, in the past they used to give contractors an advance payment before establishing the contract, but this practice has ended and sums due to contractors are often delayed. Having such power to support contractors will help them to overcome their financial problems and stay in the market.

Another difference between the two procurement systems is that while Saudi Arabia prohibits charging interest to compensate for the delay in payment, the UK has issued a special Act to remedy the loss to the contractor from such delay. The prohibition of interest in Saudi Arabia derives its legality from the sources of the legal system of the country: the *Holy Quran* and the sayings of the Prophet Mohammed. Therefore, the Board never adopts interest as a means to compensate contractors for the lateness of payment.

Finally, the procurement regulations of the two systems differ in regulating the suspension decision. While Saudi Purchasing Law does not allow suspension, even if the contractor is suffering from such delay, some UK standard forms of construction contracts give the contractor the right to suspend the performance of the contract if the delay of payment is affecting the execution of the work.

## **Summary**

This chapter has discussed the right of the contractor to receive payment. Contractors in both Saudi Arabia and the UK are suffering from the lateness of their payments. This chapter has shed light on the general causes

of such delay of payment in the two countries. Comparisons between the two procurement systems reveal reasons for lateness of payment differ between the two legal systems. In the UK, governmental bureaucratic procedures are the main reason for such delay, while in addition to governmental procedures, insufficient funds are another main reason for such delay in Saudi Arabia.

In respect of the causation of delay in Saudi Arabia, it is suggested that the Finance Ministry should have no power over the parties to the contract. When any public agency contracts with a private firm, it must have full power to pay it on time; the intervention of the Finance Ministry in providing and controlling the sums specified in the contract strips public agencies of their contractual powers. In addition, the Saudi government should provide the price of the contract in advance before dealing with private firms. Also, it should study the problems which cause the delay in payment and find solutions to them. It is also suggested that the Saudi government deals with commercial banks to pay contractors on time in the event of delay in payment in order to protect their financial rights.

This chapter has also shown that the delay in payment is less important in the UK since the delay is caused by governmental bureaucratic procedures only. Moreover, unlike Saudi practice, public agencies in the UK are prohibited from contracting if they do not have the price of the contract available. It is thus suggested that UK public agencies engage in serious efforts to effectively review and ratify the work during the normal period which is given for such checking and proofing.



In other respects, compensation for detriment to the contractor as a result of lateness of payment also differs under the two procurement systems. While the UK courts compensate contractors for any delay and charge an interest rate for every day of delay, the Board in Saudi Arabia makes it difficult for contractors to obtain compensation if they cannot convince it of their suffering from such delay.

In respect of subcontracting, the study found no provision regulating the right of sub-contractors to obtain payment under Saudi procurement regulations nor their relationship with the main contractor or the public authority, while in the UK, many regulations protect the rights of sub-contractors.

The next chapter will examine the rights of contractors and sub-contractors to obtain remedies for breach of contract under Saudi and UK procurement systems.

## **Chapter Nine**

### **Rights of Contractors to obtain Remedies**

## **Chapter Nine: Rights of Contractors to obtain Remedies**

### **Preamble**

When a procurement contract is broken by one of the parties, the other party may have various remedies available, including a court order to complete the contract, cancel the contract, arrange for a different contractor to complete the work, or sue for damages. Damages are generally limited to whatever will put the contracting party back into the same position he would have been in if the contract had been properly completed.<sup>1</sup>

Neither Saudi Arabia nor the UK has created separate regulations to deal with remedies. Saudi law-makers have empowered the Board to decide the measure of remedy, while the UK has conferred on the High Court the authority to try public procurement disputes.

Among other circumstances, there are three main possible consequences of a breach of contract: the breach may give the contractor the right to claim damages from the defaulting party; the breach may prevent the contractor from enforcing the contractual obligations; and the breach may give the contractor the right to terminate the contract.

This chapter will be divided into three parts: the first will examine various methods for obtaining a remedy for breach of tender and contract under the

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<sup>1</sup> *Livingston v. Rawyards Coal Company (1880) 5 App. Cas. 25 at 39, HL*. It is worth pointing out that this principle does not apply in every breach of contract. In some cases, a contractor should not be compensated for the future expectation he expects to gain before the breach. In the tendering procedure, the bidder may be compensated for his tender costs if the contracting authority wrongly breaches its tender obligations. Tenderers expect to win the contract when sending their tenders to the contracting authority. Therefore, if the contracting authority fails to satisfy the tender regulations, then the tenderer should obtain remedy for the cost of his tender only and not for the profits which would have been made if he had performed.

Saudi procurement system and the second will analyse this subject under the UK procurement system. In addition, a comparative analysis of the regulations of remedy between the two procurement systems will be provided at the end of this chapter.

## **I. Remedies under the Saudi regulations**

### **Introduction**

Since the issuance of the new Board Act in 1982, the Board has reshaped itself. It has developed its judicial procedures, trained judges, and expanded its jurisdiction. However, in spite of such developments, many areas are still in need of urgent review, one of which is type of remedy the litigant has the right to obtain or to ask for. The Board has no uniform system for such remedy. Each Board panel may adopt different procedures or methods to provide remedy for various litigants. It is submitted that a clear system for remedy is important to protect the rights of litigants, including procurement contractors, and to ensure that public agencies are complying with the law when issuing their decisions. In practice, the Board does not have a system of remedies with clear rules to be followed in legal claims in general, and in procurement claims in particular. Neither the Board Act nor its Proceedings Rules specify any particular remedy. In fact, judges only bear the responsibility to provide a proper remedy for the dispute.

This general theme is part of the legal culture of the country. On one side, you may find one regulation contains specific details regulating the legal matter, such as the Purchasing Law and the Company Act, on the other side, you may find some regulations draw a general framework for a legal matter such as the Board Act, and the Adjudiciary Act. This legal culture has no guidelines describing when a regulation should be issued in detail or in brief. In addition, law-makers usually leave the details to the public agency later issue implementing regulations. For example, Article 49 of the Board Act empowering the president of the Board to issue the Proceeding Rules for Litigation Before the Board Act, was supposed to be issued within one or two years from the enactment of the Board Act, however, it was issued seven years later, in 1989. In addition, Article 47 of the Board Act orders the president of the Board to “classify the judgements passed by the Board panels, print and publish the same in groups each year...”, however, no judgement has been published since two series of judgements were issued in 1980.

In spite of the criticisms mentioned above, it should be pointed out that the Board applies general rules in every case, whether concerning remedies, other matters, or to challenges to public or private action. Three principles have been adopted by the various panels of the Board in each case. These are the

prohibition against compensation for lost profits,<sup>2</sup> the prohibition against interest,<sup>3</sup> and the prohibition against remedy for the loss of banking fees.<sup>4</sup>

A contractor may expect to gain a certain amount if the performance of the contract goes as he planned, but the breach of the contracting authority may cause him to lose anticipated profits. However, under Islamic law, since only God can foresee the future, it is inappropriate for the Board to award damages based on anticipated profits.<sup>5</sup> Accordingly, a long period contract may be terminated either by its parties or the court before the date specified in the contract without concern for liability based on consequential damages.<sup>6</sup>

This section will be divided into two parts. The first will shed light on the Saudi judicial system in general and the procedure for litigation presented before the Board of Grievances in particular. The second part will explore the judgements of the Board in order to analyse various types of remedy under the Saudi system.

### **1. Saudi Judicial Systems**

The Basic Law of the Government<sup>7</sup> creates a dual system of courts, Sharia'h courts and the *Diwan Al- Madhalem* or Board of Grievances (the Board). Sharia'h courts have general jurisdiction over all disputes, whether civil or

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<sup>2</sup> Case no. 1206/1/K dated 1417 AH (1997). The prohibition against interest (*Riba*) which rejects remedy for loss of banking fees and loss of anticipated profits is explained in Chapter 6.

<sup>3</sup> Case no. 1536/1/K dated 1418 AH (1998).

<sup>4</sup> Case no. 421/1/K dated 1412 AH (1992).

<sup>5</sup> D. Karl, Islamic Law in Saudi Arabia: What Foreign Attorneys should Know, *George Washington Journal of International Law and Economics*, 1992, p. 162.

<sup>6</sup> *Ibid*, p.162.

<sup>7</sup> Basic Law of the Government (Basic Law), Royal Decree no: A/90 March 1, 1992, Art. 18.

criminal,<sup>8</sup> and the *Diwan Al- Madhalem* or Board of Grievances (the Board hereinafter), functions as the primary adjudication authority for disputes arising between contractors and governmental entities in respect of public sector projects.<sup>9</sup>

Sharia'h Courts were first organised in 1927<sup>10</sup> and consist of:

- (a) The supreme judicial council
- (b) The Appellate court
- (c) General courts
- (d) Summary courts.<sup>11</sup>

All disputes and crimes come under the jurisdiction of the Sharia'h Courts in the country, except those exceptions by law.<sup>12</sup> However, labour,<sup>13</sup> commercial,<sup>14</sup> and banking<sup>15</sup> disputes are exempted from the jurisdiction of the Sharia'h Courts.

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<sup>8</sup> The Judiciary Law, Royal Decree no. M / 64 dated 14 / 7 / 1395 AH (July 30, 1975), Art 6.

<sup>9</sup> H. Mahasni, "Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court", *The International Lawyer*, Summer, 1987, p. 837.

<sup>10</sup> N. Turck, Dispute Resolution in Saudi Arabia, *The International Lawyer*, Summer, 1988, p. 424.

<sup>11</sup> The Judiciary Law, *supra* n. 8, Art. 5.

<sup>12</sup> *Ibid*, Art. 26.

<sup>13</sup> Royal Decree no. M / 21 dated 6 / 9 / 1389 AH (1969) issued the Labour Law which stipulates in Article 177 the establishment of a Committee for the Settlement of Labour Disputes. The Committee includes a Preliminary committee which has exclusive jurisdiction over all cases concerning labour claims. The litigants are free to appeal to the Labour Supreme Committee.

<sup>14</sup> The Council of Ministers established a specific committee to resolve any dispute regarding commercial papers.

<sup>15</sup> The Council of Ministers issued its decision no. 729 / 8 on March 10, 1987, to establish a specific committee for banking disputes over claims between commercial banks and their customers.

It is worth mentioning that Islamic law is the controlling law in Sharia'h Courts.<sup>16</sup> Any claim contrary to Islamic law, such as interest, will be null and void.

## **2. The Board of Grievances<sup>17</sup>**

The Council of Ministers Act of 1953<sup>18</sup> set about providing the rudiments of the Board of Grievances. The Board started initially as one of the departments of the Council of Ministers.<sup>19</sup> During this period, the jurisdiction of the Board was limited and vague. The functions of the Board were to investigate any complaints that were brought before it and forward the results of the investigation and any recommendation to the King.<sup>20</sup> The King would instruct the recommendations to be implemented or refer the case to the Sharia'h court.

The Board at that time acted as a consultative department for the Council of Ministers. A year later, the Board became an independent body, separated from the Council of Ministers.<sup>21</sup> The Board Act of 1955 did not contain any provisions regarding the relationship between a public authority and its suppliers.

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<sup>16</sup> K. Ray, The New York Convention and Saudi Arabia: Can a Country use the Policy Defence to refuse Enforcement of non-domestic Arbitral Awards?, *Fordham International Law Journal*, March, 1995, p. 951.

<sup>17</sup> Most information in this part quoted from I. Alhudaithy, Historical Review of Saudi Administrative Contracts, (2002) 11 *Public Procurement Law Review*, pp.186-198.

<sup>18</sup> Council of Ministers Act, Royal Decree no: , dated 12/7/1373 (1953).

<sup>19</sup> *Ibid*, Art. 19.

<sup>20</sup> A. Alfaleh, "*Al-Qada Al-Edari Al-Saudi*", (Jeddah, Al-Nawabik Publisher, 2<sup>nd</sup> Ed., 1994), p.259.

<sup>21</sup> The Board of Grievances Act, Royal Decree no. 2/13/8759 dated 17/9/1374 *Umm Al-Qura* no: 1577 dated 12/6/1955.



Although the Board became an independent body in 1955, it acted as a legal department. After investigating complaints, it was required to prepare a report and send it to the king for ratification.

In 1967, a case against the Health Ministry was brought before the Sharia'h court. The defendant claimed compensation when the Ministry had withdrawn two projects from him, because he had failed to finish them on time. The Judge decided to call the General Administrator of the Health Ministry to appear on oath before the court.<sup>22</sup> After the exchange of several letters between the king and the Chief Judge, the king issued a letter no. 20941/1 in 1387 (1968) stating that Sharia'h Courts could not hear disputes against government agencies, unless they first obtained permission from the king. The king's letter was the cornerstone of a major change in the jurisdiction of the Board. In 1967, the Board was granted many additional areas of jurisdiction. For example, it has the power to investigate forgery cases and to hear complaints brought by electricity companies.<sup>23</sup>

Despite the expansion of the Board's jurisdiction, its work as an administrative court is still vague. It does not have the independence to judge cases and issue effective decisions or judgements.

In the mid 1970s, an important case was brought before the Board. A contractor, Dallah Company, sued the Defence Ministry, claiming that the

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<sup>22</sup> M. Al-Jerba, *"The Board of Grievances: A Study of the Institution of Diwan Al-Madhalim of Saudi Arabia with particular Emphasis on its Administrative Jurisdiction"*, 1992, Ph.D. Dissertation, University of Essex, p. 128.

<sup>23</sup> *Ibid.* p. 130.

Ministry had suspended and disrupted the contractor's performance. This delay caused a rise in the price of the contract. The contractor sought to recover damages for the change in prices. The Defence Ministry referred the demand to the Council of Ministers. The Council studied the company's demand and issued decision no. 818, dated 17/5/1396 (1976), which provides an important clarification of the potential relief available to contractors whose performance has been delayed or disrupted by the government.

The Board had until that time functioned for over twenty years as the primary adjudicatory authority for disputes arising between contractors and governmental entities in respect of public sector projects without any specific statutory authority for so doing.<sup>24</sup>

Now, for the first time, a final and obligatory decision against a governmental agency could be made. Decision no. 818 gave the Board the power to make a final decision binding on a government department, and the Board thus acquired the powers of an administrative court.<sup>25</sup>

In May 1982, the Board Act was revised by royal decree.<sup>26</sup> The Explanatory Note to the Law of the Board states:

*" In view of the numerous laws and resolutions which have added new functions to the Board since its inception, and in order that the functions of the Board be specific and clear, as well as the procedures which are to be followed in the adjudication of cases which fall within its jurisdiction, and in anticipation of the addition of new functions to the Board, it has become necessary to issue a comprehensive law for the Board ".*

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<sup>24</sup> H. Mahasni, *supra* n.9, p. 170.

<sup>25</sup> M. Al-Jerba, *supra* n, 22, p. 134.

<sup>26</sup> The Board Act, *supra* n. 21.

The new Act contains provisions which satisfy the call for its development consequent on the system of government and the expansion of the fields of administrative activities in the kingdom and the numerous disputes arising therefrom and relating to administrative resolution and contracts.

The jurisdiction of the Board is included in Article 8 of the Act. The Board has attained general jurisdiction to adjudicate disputes to which a public agency is a party, whether such disputes arise out of a decision, a contract, or an event.<sup>27</sup>

It is worth mentioning that in the view of the advantages ensuing from the publication of judgements, the most important of which is the explanation of the rules and principles of administrative contracts, it has been provided in article 47, that at the end of every year the Board shall classify the judgements passed by the Department of the Board, and print and publish them.

In fact, the Board has issued only two series of judgements covering the period from 1977 to 1980. There have been many requests from specialists and the public to publish the remaining judgements, but the Board has not acceded to these requests. The philosophy underlying the reluctance to publish its decisions is unclear. Despite press articles, telegrams, complaints, the Board insists on not publishing its decisions.

Before concluding this section, it is worth discussing the impact of foreign experts in Saudi administrative cases. In the early years of the foundation of

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<sup>27</sup> The Board Act, *supra* n.21, Art. 8 ( b, c, d).

Saudi Arabia, extensive use of professionals was made. The Board, like other government agencies, appointed legal experts from Arab countries, most of them from Egypt. These experts worked together with the Sharia'h advisors under the umbrella of the Board.

The Board felt that contemporary problems raised by modern administrative actions needed highly technical expertise and could best be controlled by professional experts. Early Saudi judges were not trained as technical experts in administrative actions, but in Sharia'h law. They planned to become specialists in administrative problems after some experience gained from working with these foreign experts. After many years, Saudi judges became capable of dealing with complex procurement cases.

Foreign experts played an important role in developing the modern administrative theory. They transferred the leading principles from French law relating to *Force Majeure*, unexpected accident, and the characteristics of administrative contracts to Saudi administrative law.<sup>28</sup>

In other words, Saudi public contracts are derived from Egyptian Administrative Law which, in turn, is based on French Law. Islamic law, which covers the Saudi legal system, contains rules which encourage the law-makers to benefit from other people's laws as long as these laws do not conflict with Islamic law. If they do, they will be null and void.<sup>29</sup>

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<sup>28</sup> H. Mahasni, *supra* n.9, M. Al-Jerba, *supra* n, 22, and N. Turck, *supra* n, 10.

<sup>29</sup> *Ibid.*, p. 10.

Before analysing various types of remedy, it is worth mentioning a jurisdictional problem that the Board has faced in some circumstances.

### **3. Jurisdictional problem**

In order to illustrate the jurisdictional problem, it is important to divide the jurisdiction of the Board into two periods, the old jurisdiction which covered the period from 1973 until 1982, and the recent jurisdiction which started from the enactment of the recent Law for the Board in 1982.

#### **a. The old jurisdiction**

Prior to 1982, the Board had no power to grant any remedy against public agencies "unless such remedy was a consequence of the negligence of the contracting authority". This restriction was requested by the Council of Ministers as a result of its decision number 818 dated 17/ 5/ 1396 AH (1976) (decision 818 hereinafter). Decision 818 stated in its first article "remedy against public agencies is exclusive to the claims of contractors based on the infringement of contracting authorities which has caused detriment to contractors".<sup>30</sup> The consequence of this decision prevented contractors from obtaining remedies not related to the contracting authority's breach of its contractual obligations.<sup>31</sup> Therefore, contractors had no rights to remedy their suffering, unless it was a result of the contracting authority's breach of its contractual obligations. To this end, *Force Majeure*, an Act of God, and an Act of State, were not covered by the

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<sup>30</sup> Council of Ministers Decision no. 818 dated 17/ 5/ 1396 AH (1976), Art. 1.

<sup>31</sup> Case no. 5 / T dated 1397 AH (1979).

jurisdiction of the Board. Contractors, in such cases, had to obtain prior approval from the Council of Ministers in order for the Board to try their case.<sup>32</sup>

Decision 818 did not explain the reasons for this restriction, but it may be inferred that because such remedy may be paid from the public budget, the Council of Ministers drew such restriction to protect the public fund. Whatever the reason behind such decision, many contractors lost their rights to obtain remedy because such a decision prevented the Board from exercising its jurisdiction to help an aggrieved contractor remedy his loss.

**b. Recent jurisdiction**

The Board has been reshaped since 1982. A new Act has been enacted and the Board's jurisdiction has been expanded. It has attained a general jurisdiction to adjudicate disputes, whether such disputes arise out of a decision, a contract, or an event.<sup>33</sup> According to the Board Act, the Board has jurisdiction over disputes concerning public agencies. However, in practice, some royal decisions issued through the Council of Ministers made some exceptions to this general jurisdiction. For instance, decision 818 prevented the Board from hearing any dispute not caused by the negligence of public agencies unless prior consent was given by the Council of Ministers. Nevertheless, the Board's panels expressed different views regarding cases brought to the Board not related to the negligence of public agencies, such as a loss caused by a *Force Majeure*

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<sup>32</sup> Council of Ministers Decision no. 818, Art. 3, *Case no. 8 / T dated 1398 AH (1978) and Case no. 9 / T dated 1398 AH (1978)*.

<sup>33</sup> The Board Act, Arts. 8 (b)(c)(d).

event. Two divergent views have been taken: to set aside decision 818,<sup>34</sup> or to view it as still valid.<sup>35</sup> Panels which supported the view to set aside decision 818 heard cases unrelated to the negligence of public agencies and other cases in general, i.e. a contractor has the right to request compensation directly from the Board if his performance is affected by hurricane, flood, war or any other *Force Majeure* event. Those who supported the second view, and insisted that decision 818 was still valid, held the view that contractors requesting remedies for circumstances not related to the breach of governmental obligations must obtain prior approval from the Council of Ministers, i.e. even if the contractor suffers from a *Force Majeure* event, he must obtain prior approval from the Council of Ministers to approach the Board to judge his case. The Review Committee supported the second view and held that decision 818 was a general principle and panels of the Board must comply with its conditions and request contractors to obtain prior approval from the Council of Ministers in cases not related to the negligence of public agencies.<sup>36</sup>

However, after the exchange of letters between the President of the Board and the Council of Ministers, the latter sent a clear decision to set aside decision no. 818 and consequently informed the Board that decision 818 should be deemed invalid since the enactment of the Board Act of 1982.<sup>37</sup> Thus, after this decision, the Board has general jurisdiction over any procurement dispute,

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<sup>34</sup> Case no. 18 / D / 1 / 3 dated 1413 AH (1993). and Case no. 247 / T / 1 dated 1419 AH (1999).

<sup>35</sup> Case no. 336 / T / 2 dated 1414 AH (1994) and Case no. 224 / T / 1 dated 1420 AH (2000).

<sup>36</sup> Case no. 336 / T / 2 dated 1414 AH (1994).

<sup>37</sup> The Council of Ministers' Decision no. 3 / 207 / M dated 25 / 2 / 1421 AH (2001).

whatever the cause of the dispute, and contractors have the right to claim damages directly to the Board.

**c. Proceedings before the Board**

The Board operated without formalised rules of proceeding procedures until mid-1989, when the Council of Ministers<sup>38</sup> approved the procedural rules governing proceedings before the Board.<sup>39</sup>

The Proceedings before the Board Rules (Proceeding Rules) contain 47 articles divided into four sections. The first section regulates the procedures of administrative claims. The second section regulates claims for compensation against public agencies. The third section regulates official corruption disputes, and the fourth section regulates appellate procedures.

The claimant commences his case by filing a statement of claim,<sup>40</sup> either with the office of the Board located in the region in which the events giving rise to the claim have occurred, or with the president of the Board who will assign the claim to the panel in the appropriate region.<sup>41</sup>

Unlike UK procedures, contractors dealing with Saudi public agencies are not required to inform the contracting authority that they will dispute its decision to the Board.<sup>42</sup> They have the right to make a claim to the Board directly without

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<sup>38</sup> The Proceedings before the Board Rules (Proceeding Rules), The Council of Ministers' Decision no. 190 dated 16 / 11 / 1409 AH (1989).

<sup>39</sup> A. Knitzalis, The Saudi Arabian Board of Grievances, *The International Lawyer*, Fall 1990, Vol. 24, No. 3, p. 837.

<sup>40</sup> H. Mahasni, *supra* n.9, p. 837.

<sup>41</sup> Proceeding Rules, *supra* n. 38, Art. 4.

<sup>42</sup> Case no. 143 / 1 / T dated 1411 AH (1991).



informing the contracting authority.<sup>43</sup> However, they must bring their claim within five years from the date on which the events giving rise to the action first occurred.<sup>44</sup> Another important factor is that five year period permitted for a claim does not include public agencies' claim against private contractors. Public agencies have the right to sue contractors and obtain compensation regardless of when the action giving rise to the claim occurred.<sup>45</sup> The five year period applies to private contractors only. Surprisingly, the Board has supported this view and held that the public agency has the right to sue a private contractor irrespective of when the events giving use to action first occurred.<sup>46</sup> Another important development in litigation procedure before the Board is the Proceeding Rules' requirement that the Finance Ministry and the Public Audit Bureau participate in the litigation procedure as custodian of public funds.<sup>47</sup> If the Board fails to summon them to the litigation procedure the Board's judgement will be void.<sup>48</sup>

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<sup>43</sup> In practice, there are no regulations requiring contractors to inform the contracting authority that they will sue it. Contractors usually try to settle their disputes with contracting authorities without going before the Board of Grievances. If the negotiation outcome does not satisfy them they will usually sue the contracting authority.

<sup>44</sup> Proceeding Rules, *supra* n. 39, Art. 4. In fact, Article 4 ended a long period of unjust practice adopted by public agencies before issuance of the Proceeding Rules. Complainants, including procurement contractors, had repeatedly complained about the Council of Ministers' decision no. 968 dated 16/ 9 / 1392 AH (1972) that stipulated no public agency could accept a financial claim against it if made after a period of three years, other than claims relating to salaries and allowances. In other words, this decision prevented individuals from obtaining their financial rights if they failed to file a claim within three years of the time when event giving rise to action first arose. Since 1989, the Board has extended the claim period to five years. The original Council of Ministers' decision no. 689 has been replaced by article 5 of the Proceeding Rules. For more information see Case no. 245 / T / 3 dated 1410 AH (1990), and Case no. 114 / T / 3 dated 1411 AH (1991).

<sup>45</sup> A. Al - Wehaiby, *The Organising Principles for Administrative Contracts and its Applications in Saudi Arabia*, (1<sup>st</sup> Edition, Riyadh, 2002), p. 411.

<sup>46</sup> Case no. 24 / 1 / T dated 1410 AH (1990).

<sup>47</sup> Proceeding Rules, *supra* n.38, Art. 35.

<sup>48</sup> Case no. 799 / 1 / T dated 1411 AH (1991).

In procedure, the Finance Ministry issues specific regulations to regulate joint procedures with other public agencies.<sup>49</sup>

**d. The right of the contractor to appeal**

The Board's judicial functions are carried out through panels reflecting the different types of jurisdiction given to the Board.<sup>50</sup> Once the panel has finished hearing evidence and preparing a case for a final decision it should examine the documents and investigate the facts of the case. During this period, the panel may, and frequently does, at its discretion, reconvene the hearing if it finds that additional arguments or evidence are needed.<sup>51</sup> Also, it may ask for assistance from experts if the case requires this.<sup>52</sup> In fact, it is not uncommon for a case to require two to three years to adjudicate.<sup>53</sup>

Once the panel has issued its judgement, it is required to do two things. First, it must inform the contractor that he has the right to appeal within thirty days, commencing from the day on which he received a copy of the judgement.<sup>54</sup> If he fails to appeal within the specified time, then the judgement will automatically be final and enforceable.<sup>55</sup> Second, it is necessary to send a

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<sup>49</sup> Decision no. 17 / 698 dated 5 / 4 / 1411 AH (1991). The regulations stipulate that if the value of the claim is less than one million Saudi Riyals then there is no need for the Finance Ministry and the Audit Bureau to intervene in the proceedings. However, if the value of the case is between one million to one hundred million Saudi Riyals, then each agency, the contracting authority, the Finance Ministry and the General Audit Bureau, are required to submit a separate memorandum to the Board. Further, if the price of the case exceeds one hundred million Saudi Riyals, then the Finance Ministry and the General Audit Bureau are obliged to submit one memorandum, which requires legal experts in both agencies to sit together to study and analyse the case before submitting their defence.

<sup>50</sup> M. Al-Jerba, *supra* n, 22, p. 183.

<sup>51</sup> H. Mahasni, *supra* n.9, p. 843.

<sup>52</sup> Proceeding Rules, *supra* n. 38, Art. 1.

<sup>53</sup> N. Turck, *supra* n, 10, p. 425.

<sup>54</sup> Proceeding Rules, *supra* n. 38, Art. 31.

<sup>55</sup> Proceeding Rules, *supra* n. 38, Art. 31. *Case no. 35 / 1 / T dated 1413 AH (1993) and Case no. 103 / 1 / T dated 1412 AH (1992).*

copy of the judgement to the president of the Board who will refer the case to a Review Committee.<sup>56</sup> In procedure, there are four Review Committees established by the decision of the president of the Board as an implementation to the requirement of Article 6 of the Law of the Board.<sup>57</sup>

The Review Committee of the Board is empowered by Board law to review legal decisions taken by panels and committees of the Board regarding disputes brought before them. Accordingly, the Review Committee has the discretion to conduct a substantive evaluation of all elements of the dispute if they are related to the legal adjustment of claims and their evidence. Therefore, it has the power to request the panel which issued the decision under review to submit what is necessary for adjudication in the case, in accordance with the legal adjustment of claims of the Review Committee whose decisions are not reviewable.<sup>58</sup> Subsequently, the Review Committee, which is headed by the President of the Board, has the right to confirm or revise panel decisions or return them to the panel for further consideration. In practice, the Board's panels are required to review the comments and answer questions raised by the Review Committee and send their subsequent decision back to it. It, in turn, is required to accept or reject such comments and answers.<sup>59</sup> If the panel insists on standing by its original decision, then the Review Committee has two options: to refer the case

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<sup>56</sup> Proceeding Rules, *supra* n. 38, Art. 34. Although it is called the Review Committee of the Board, an English lawyer would understand its functions as dealing with

<sup>57</sup> Decision no. 11 dated 1406 AH (1986).

<sup>58</sup> *Case no. 631 / T / 1 dated 1405 AH (1985)*. Cited in M. Al-Jerba, *supra* n. 23, p. 342.

<sup>59</sup> Proceeding Rules, *supra* n. 38, Art. 36.

to another panel or to issue the decision itself.<sup>60</sup> If it decides to try the case itself, it should conduct the hearing again, accept new evidence, and resort to the experts if needed.<sup>61</sup> The decision of the Review Committee will be final and enforceable.

By reviewing and considering the case, the Review Committee has a double function: to rehear the case, including any new argument or evidence, and an appellate court function. In fact, this jurisdiction gives the Review Committee its unique character. In contrast, the appellate court "*Mahkmat al-Tamyeez*" under Sharia'h courts, has only one function divided into several sub-functions:<sup>62</sup> to review the legality of the judgement of the first court, to send its comments and answers to it, and to appoint another judge to hear the case, but not to open the case for additional hearing. In fact, it does not exercise the role of the first court as this is the role of the Review Committee of the Board.

#### **e. Appeal methods**

In practice, there are two types of appellate procedures: ordinary and automatic.<sup>63</sup> The ordinary procedure leaves the burden of the appeal to the contractor. If the contractor wishes to challenge the judgement, he must send his written notice within thirty days from receiving the judgement. The panel is under an obligation to inform the contractor that he is entitled to challenge the

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<sup>60</sup> *Ibid*, Art. 36.

<sup>61</sup> *Ibid*, Art. 36.

<sup>62</sup> The Judicial Law, *supra* n. 8, Art. 10.

<sup>63</sup> *Ibid*, Art. 35.

decision of the Board within thirty days from the date on which he received the judgement.<sup>64</sup>

Automatic appeal deserves further discussion. The appeal will automatically be brought before the panels of the Board. The Proceeding Rules require the panels of the Board to send the judgement directly to the Review Committee if the judgement is issued in the favour of an individual, either procurement contractors, or any other individual in other types of cases.<sup>65</sup> Accordingly, any judgement issued against the public agency must be sent directly to the Review Committee.<sup>66</sup> In fact, the Proceeding Rules do not contain any justification for this stipulation. However, one may infer that the dispute against the public agency may mean the agency paying compensation and remedies to contractors, which in the end will be deducted from the public budget. The purpose may be to safeguard the public fund by making an appeal mandatory. One may dispute this stipulation. Whatever the reasons behind it, litigants must be treated equally. Favouring one party because of his position or power and providing him with special treatment will affect the credibility of the court. The Board, as a court, is required to provide similar rights to all litigants in spite of their position. Hence, it is submitted that the Board should amend this unfair practice and treat contractors and public agencies equally. Further, it is submitted that protecting the public fund is weak justification for discrimination against contractors because protecting the public fund is a governmental

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<sup>64</sup> *Ibid*, Art. 35.

<sup>65</sup> *Ibid*, Art. 34.

<sup>66</sup> *Case no. 66 / T / 1 dated 1412 AH (1992) and Case no. 750 / T / 1 dated 1411 AH (1991).*

function and does not come under the jurisdiction of the Review Committee. The Basic Law of the Government empowers each minister or head of a public agency to expend his best endeavours in managing his public agency.<sup>67</sup> Each is required to do his best to protect the public fund. Any negligence or carelessness on the part of his employees will be actionable. Accordingly, one cannot rely on protection of the public fund to justify discrimination against contractors.

## **2. Types of remedy under the Saudi system**

This section will focus on analysing particular types of remedy under Saudi regulations. Interim relief, mandatory order, injunction order, and execution of foreign remedies obtained through foreign judgements are the focus of attention in this section.

### **a. Interim relief (*Amr Mustajel*)**

Interim relief is a very important measure to protect tenderers and contractors. It gives them an opportunity to suspend the action of the contracting authority immediately, in order to prevent substantial damages to them. Accordingly, once tenderers or contractors feel that the decision of the contracting authority is unjust and its effect will have a negative influence on their procurement position, they should request an interim measure in order to suspend the effect of the decision of the contracting authority until the court expresses its opinion regarding the legality of such a decision. In fact, most procurement regulations, both Saudi and UK, give contractors the right to rely on

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<sup>67</sup> Basic Law of the Government, *supra* n. 6, Art. 18.

interim relief to obtain a temporary injunction in order for the court to correct the alleged infringement or to prevent further damage.

Generally, the Board has the power to issue interim relief in every matter under its jurisdiction, including procurement contracts.<sup>68</sup> The Proceeding Rules require the Board to issue its temporary injunction within 24 hours of submission of the request for the relief, if the Board thinks the demand of the contractor is justified.<sup>69</sup>

In practice, tenderers and contractors may request interim relief in every case related to the execution of the contract, such as when a tenderer feels that he is unlawfully excluded from an award procedure or when the contracting authority prevents a contractor from entering the site of the work, or if the contracting authority seizes the machinery of the contractor. But, mostly, contractors resort to the Board when the contracting authority decides to rescind their contract or when it terminates a contract and contracts with another contractor at the expense of the original contractor.

Finally, it should be pointed out that the Board does not apply the principle of precedent to its judgements. Therefore, judges have discretion to grant or deny the interim relief regardless of the circumstances of the case. They are not required to follow their preceding judgements in similar cases concerning the issuance of interim relief. Thus, the Board is not bound to grant interim relief to a contractor because he was previously issued relief in similar circumstances.

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<sup>68</sup> Proceeding Rules, *supra* n. 38, Art. 5.

<sup>69</sup> *Ibid*, Art. 5.

**b. Injunction remedy (*Ta'weed Maley*)**

In general, the injunction remedy in public and private law to protect the rights of litigants against the breach of the law is available under the Board's jurisdiction. The Board has the jurisdiction to grant an injunction remedy against public authorities and private sectors. Under private law, the Board is empowered to adjudicate in commercial disputes between private companies. However, this study is not the right place to discuss private law remedies. In the public law field, an injunction remedy may be claimed against a public authority to restrain a public agency from acting unlawfully. However, sovereign acts of the government<sup>70</sup> are excluded from the jurisdiction of the Board.<sup>71</sup> The judgements of the Board show that the injunction may be prohibitory or mandatory. In practice, it is clear from analysing the judgements that the Board concentrates more on the prohibitory injunction than the mandatory form. In fact, it is usual practice for the Board to use an interim injunction or panel decision to restrain a public agency from continuing to adopt unlawful decisions.<sup>72</sup> On the other hand, the Board uses its power quite frequently to order a public agency to remove such an unlawful decision.<sup>73</sup>

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<sup>70</sup> In fact, neither the Board nor the government identifies the scope of the sovereign acts of the government. Unfortunately, there is no framework or guidelines to help to distinguish sovereign acts from other actions of the government. However, in practice, most sovereign acts related to national /international policy, for example, firing a public employee from because he disagrees / expresses opposition to proposed government expenditure.

<sup>71</sup> The Board Act, *supra* n. 21, Art. 8(e). Unfortunately, the Basic Law does not specify any court or legal entity for claims against the sovereign decision of the government and claimants have no right to defend themselves in these types of cases.

<sup>72</sup> Proceeding Rules, *supra* n. 38, Art. 35.

<sup>73</sup> *Case no.378 /1 / K dated 1400 AH (1980).*



Neither the Board nor the Judicial Act set out the circumstances in which the judicial body can grant such injunction. Accordingly, granting such an injunction is left to the discretion of the judicial body in general and the Board in cases under its jurisdiction. This situation requires urgent reform. First, the reform should protect the rights of litigants if they know that the action of the public agency will be restrained under the rules of the Board. Second, reform should limit the discretionary power of the Board's panels, which will result in treating all litigants equally.

In procurement disputes, the Board uses the injunction remedy as a means to prevent the contracting authority from continuing its actionable act. In this regard, contractors usually request the Board for an interim injunction to restrain substantial damages to them. An interim injunction is a temporary injunction granted by the Board in order for the contracting authority to correct its decision and protect a contractor from further damages. Interim injunctions of this kind will be discussed in more detail at the end of this section. In practice, an interim injunction is usually granted before commencing the case in order for the Board to suspend the decision of the contracting authority if it will cause irreparable harm to the contractor. In addition to an interim injunction, an injunction may be granted at the conclusion of the proceedings. In fact, this is the usual practice of the Board in its daily proceedings. In addition to damages, the Board usually orders contracting authorities to refrain from unlawful actions

against procurement contractors. In one case,<sup>74</sup> the Board issued its injunction decision to prevent the contracting authority from acting unlawfully. It ordered the contracting authority to return the rent of the school to the contractor and held that it had no right to request the negligent contractor, who had delayed completion of the school project, to pay the rent of the school, which the contracting authority rented, because the contractor had not completed the school project within the agreed time. In another case,<sup>75</sup> the Board prevented the contracting authority from penalising the contractor twice for one breach. It prevented the contracting authority from seizing a performance bond, and granted only the rescinding of the contract and re-contracting with a new contractor at the expense of the original contractor.

**c. Mandatory order (*Amr Qadhaey*)**

Besides forcing the contracting authority to refrain from acting unlawfully, the Board also has the power to order the authority to perform its duty. The Board applies this jurisdiction through issuance of a mandatory order. As with the injunction remedy, there is no framework to guide the judges of the Board when they issue such an order, nor are there clear rules to distinguish this type of remedy from other types. In general, the Board adopts a mandatory order not

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<sup>74</sup> *Case no. 591 /1 / K dated 1416 AH (1996)*. The fact of the case shows that the Education Ministry contracted with a contractor to build a school and to be complete on a particular date. The Ministry planned to use the school once it had been completed but the contractor finished the school five months later than the agreed time. The Education Ministry rented a house to start its school year and requested the contractor, in addition to paying the delay fine to pay the rent of the house for the period of delay.

<sup>75</sup> *Case no. 142 / 3 / K dated 1416 AH (1996)*.

only in procurement disputes, but also in other public law disputes. The claimant is responsible for showing infringement of a legal right in order for the Board to issue its order to correct it. However, it is obvious that a claimant must have legal standing, before complaining to the Board.

It is worth pointing out that the Board specifies no particular panel for a mandatory order. In practice, any panel of the Board has the power to issue a mandatory order. In addition, under the UK system, an aggrieved litigant has the right to sue the public agency for breaching its public duties by bringing an action in tort for damages, while an aggrieved party under the Saudi system will bring his action under a contract not a tort remedy.

#### **4. Enforcing Remedies in foreign judicial**

Since the early development plans of the country, many judicial have been issued in foreign countries against Saudi public agencies and local firms in connection with claims arising from the execution of procurement contracts. Some of these judgements and awards include damages in favour of foreign plaintiffs. Foreign litigants must satisfy certain requirements before requesting enforcement of their judicial in Saudi Arabia. Before analysing such requirements, brief information about enforcing foreign judgements will be provided to illustrate the ability of foreign litigants to obtain such remedy.

In fact, there is no special regulation regulating the enforcement of foreign judgements in Saudi Arabia. However, the country is a member of the

Arab League Convention for the Enforcement of Foreign Arbitral Awards (Arab Convention)<sup>76</sup> and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) of June 10<sup>th</sup>, 1958.<sup>77</sup> The Board is empowered with the jurisdiction to enforce foreign judgements and arbitral awards.<sup>78</sup> However, the Board Act does not clarify the procedures for enforcing foreign judgements. Accordingly, the Proceeding Rules request foreign litigants to follow procedures similar to those in local cases brought before the Board and, accordingly, request the President of the Board to enforce the former's judgements or arbitral awards.<sup>79</sup>

### **Requirements to enforce foreign judgements in Saudi Arabia**

There are many requirements which must be satisfied in order for foreign judgements to be enforced in Saudi Arabia. These requirements are:

- 1- There must be reciprocity between the Saudi government and the country of a foreign plaintiff to enforce foreign judgements in both countries.
- 2- Foreign judgements must not be in conflict with Islamic law.
- 3- Foreign judgements must be issued according to judicial procedures.

Each of these elements will be analysed separately below:

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<sup>76</sup> It came into force on 28 / 6 / 1954.

<sup>77</sup> Council of Ministers Decision no. 78 dated 14/ 7/ 1414 AH (1984).

<sup>78</sup> The Board Act, *supra* n. 21, Art. 8(m).

<sup>79</sup> The Proceeding Rules, *supra* n. 38, Art. 6.

1. The requirement of reciprocity between the Saudi government and the country of a foreign plaintiff to enforce foreign judgements in both countries is the core of enforcement of foreign judgements in Saudi Arabia. In fact, this requirement is mentioned in Article 3 of the New York Convention, which requires signatories of the convention to provide similar treatment to other members of the convention. However, it is worth mentioning that before 1994, when Saudi Arabia became a signatory to the New York Convention, no right existed for foreign litigants, whose countries were not members of the Arab League Convention for the Enforcement of Foreign Arbitral Awards, to have their foreign judgements enforced because there was no reciprocity between their countries and Saudi Arabia. Moreover, additional restrictions added to the constraint on executing foreign judgements because the Proceeding Rules, adopted in 1989, stipulated that foreign judgements must not be in conflict with Islamic law.<sup>80</sup> The President of the Board issued a circular regulating the execution of foreign judgements which stated that: 'The panel of the Board is guided by the provisions of the Arab League Convention for the Enforcement of Foreign Arbitral Awards in matters related to reciprocity. Thus, judgement and arbitral awards issued through Saudi Courts must enjoy similar treatment to local judgements issued through the courts of the foreign country'.<sup>81</sup>

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<sup>80</sup> *Ibid*, Art. 6.

<sup>81</sup> Circle no. 7, dated 15 / 8 / 1405 AH (1985). Saudi Arabia is also a member of the 1995 Protocol on the Enforcement of Judgements Letters Rogatory and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Cooperation Council (GCC).

In practice, the burden of proving such reciprocity rests with the foreign plaintiff.<sup>82</sup> He must provide an official certificate from his government to prove such reciprocal treatment between his country and Saudi Arabia. Accordingly, in one case the Board<sup>83</sup> allowed a hearing to execute a British judgement which issued from the High Court because the plaintiff was successful in substantiating the principle of reciprocal treatment. He did so by means of the documents which he submitted to the panel, including a copy and certificate from the Lord Chancellor's Department which confirmed the possibility of executing foreign judgements in the United Kingdom, whether issued by Saudi or other Courts.<sup>84</sup>

2. Foreign judgements must not be in conflict with Islamic law.

Proving reciprocity is the key for foreign judgements to be heard by the panels of the Board. Once a foreign plaintiff satisfies this requirement his judgement will be investigated in order to see whether it conforms to the public policy of the country. Therefore, it is not enough for a foreign judgement to be reciprocal, it must also not conflict with the law of the country. In fact, the basis of this condition is found in most conventions relating to the execution of foreign judgements in other countries. Article V(2)(b) of the New York Convention, for example, permits a country to reject any award that is contrary to its public policy.<sup>85</sup> A similar article is stipulated by the Arab Convention.<sup>86</sup> Accordingly, the

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<sup>82</sup> *Case no. 738 /1 / K dated 1406 AH (1986).*

<sup>83</sup> *Case no. 185 /2 / K dated 1409 AH (1989) and Case no. 186 /2 / K dated 1409 AH (1989).*

<sup>84</sup> H. Ruttley and Ch. Mallat, "*Commercial Law in the Middle East*", Graham & Trotman, 1995, p. 307.

<sup>85</sup> K. Roy, *supra* n. 16, p. 953.

panel has the right to refuse enforcement of any foreign judgement if it is contrary to the public policy of the country.<sup>87</sup> Consequently, in one case the Board rejected the claim of the British company, mentioned above, because it contained financial interest contrary to Sharia'h law. However, where the plaintiff requested the panel to cancel such interest from the total amount of the remedy, the panel accepted this solution.<sup>88</sup> In another case, the Board rejected the request of a foreign litigant to execute his judgement because the basis of the contract was a surety loan which conflicts with Islamic law.<sup>89</sup>

3. Foreign judgements must be issued according to judicial procedures.

This is a basic condition demanded by the nature of justice. Any judgement must be issued according to a judicial procedure. The parties of the case must have the right to define their case and to provide their evidence. Also, the parties must have the right to appeal to the appellate court and the judgement must be final. Accordingly, in one case the Board rejected the execution of a foreign judgement issued from a Kuwaiti court because the judgement showed that the defendant had not attended the court and had not defined his case to the court.<sup>90</sup>

To conclude this part, one question needs to be raised concerning the execution of foreign judgements issued from courts that do not have a reciprocal

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<sup>86</sup> Arab Convention, Art. 2.

<sup>87</sup> Circle no. 7, dated 15 / 8 / 1405 AH (1985).

<sup>88</sup> *Case no. 185 / 2 / K dated 1409 AH (1989) and Case no. 186 / 2 / K dated 1409 AH (1989), supra n.??*

<sup>89</sup> *Case no. 279 / 1 / O dated 1399 AH (1977).*

<sup>90</sup> *Case no. 12 / 3 / F dated 1406 AH (1986).*

arrangement with the Saudi government. What are the rights of foreign litigants if a remedy has been granted them against the Saudi government or local firm? To answer this question, it is important to note that the decision element included in the foreign judgement must not contradict Islamic law. If it does, it will not be enforceable in Saudi Arabia. Foreign litigants must be aware of this requirement.<sup>91</sup>

## **II. Remedies under UK regulations**

### **Preamble**

Under the UK system, as under the Saudi system, there are no separate regulations for remedies but several provisions are distributed between many regulations, such as procurement regulations and Civil Procedure Rules. In fact, prior to 1991, the year in which the first UK procurement regulations were published, remedies for breach of procurement contracts signed by Local Authorities were regulated by section 135 of the Local Government Act 1972<sup>92</sup> and sections 17 and 19 of the Local Government Act 1988.<sup>93</sup> They could be obtained by way of application for judicial review as required by section 31 of the Supreme Court Act 1981.<sup>94</sup> Although procurement contracts of Local Governments are regulated by some statutory provisions, special aspects of central government contracts are dealt with through administrative mechanisms

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<sup>91</sup> It is worth mentioning that litigation is free in Saudi Arabia. No court fees are paid by litigants who have the option to contact lawyers to raise a case on their behalf or to sue the offending parties themselves without requiring to lawyers or legal advisors.

<sup>92</sup> Local Government Act 1972.

<sup>93</sup> Local Government Act 1988.

<sup>94</sup> *O'Reilly v. Mackman* (1983) 2 AC, 237.



which either have no formal legal backing at all, or which have legal effects only as contractual terms.<sup>95</sup> Moreover, there were government guidelines on contract awards, which, however, did not grant any rights to bidders.<sup>96</sup> Consequently, the unsuccessful tenderer had no legal basis to challenge tendering procedures which excluded him from the tender competition. However, the amount recoverable was stated to be limited to the costs of preparing his tender.<sup>97</sup> Further, it is obvious that a person who suffers detriment from a deliberate breach of the contracting authority has a right to remedy loss.<sup>98</sup>

In practice, procurement disputes are usually solved by one of three ways: mitigation, arbitration, or through the ordinary courts. Normally, contractors resolve their procurement disputes by informal negotiation between the government and the contractor, or, if this is not successful, by arbitration.<sup>99</sup> It has not been considered necessary for a specialist tribunal to deal with legal issues relating to procurement awards, and such disputes are resolved by the High Court, or the Court of Session if the contract is executed in Scotland.<sup>100</sup>

It is worth mentioning that according to Art. 31(4) of the Public Works Regulations, a contractor who performs a contract in Scotland is required to

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<sup>95</sup> I. Harden, Defining the Range of Application of the Public Sector Procurement Directives in the United Kingdom, (1992)1 *Public Procurement Law Review*, p. 362.

<sup>96</sup> D. Pachnou, Bidders' Remedies to Enforce the EC Procurement Rules in England and Wales, (2003) 12 *Public Procurement Law Review*, p. 35.

<sup>97</sup> S. Arrowsmith, Enforcing the EC Public Procurement Rules: the Remedies System in England and Wales, (1992)1 *Public Procurement Law Review*, p. 97.

<sup>98</sup> *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food* [1986] *Q.B.* 716.

<sup>99</sup> P. Cane, '*Administrative Law*', (Oxford, Oxford University Press, 4<sup>th</sup> Ed, 2000), p. 303.

<sup>100</sup> S. Arrowsmith, *supra* n. 97, p. 69.

bring his case before the Court of Session. The Court of Session<sup>101</sup> has jurisdiction over the actions of the public body. It may intervene if a public body violates its own constitution or rules or errs in law or infringes natural justice.<sup>102</sup>

In general, as mentioned above, the UK judicial system does not specify a particular court to solve disputes involving public agencies. The ordinary courts are empowered with the jurisdiction to review claims against public authorities, including procurement disputes. Nevertheless, the courts distinguish between rights derived from private law contract and those belonging to public law. Under public law rights, the courts have the ability to invoke their jurisdiction to ensure that the public authorities perform and exercise their statutory duties and powers.<sup>103</sup> Consequently, they have inherent jurisdiction to judicially review the decisions of public authorities.<sup>104</sup>

This section will be divided into two parts. The first will investigate procedural methods, such as Judicial review remedies, the requirement of notification, time limit, and the conditions of the claim, while the second part will illustrate types of remedies which procurement contractors may claim.

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<sup>101</sup> The Court of Session is the supreme civil court in Scotland. It is organised into two divisions called the Outer House which hears cases at first instance on a wide range of civil matters, including cases based on delict (tort) and contract, commercial cases and judicial review and the Inner House, which is primarily a court of appeal. H. MacQueen, *'Studying Scots Law'*, (Edinburgh, Butterworth, 1999, 2<sup>nd</sup> Ed), pp. 10-13, and D. Walker, *'the Scottish Legal System'*, (Edinburgh, Sweet & Maxwell, 2001, 8<sup>th</sup> Ed), pp. 517-520.

<sup>102</sup> H.W.R., Wade, & C. F., Forsyth, , *Administrative Law*, (Oxford University Press, 9<sup>th</sup> Edition, 2004), p. 635.

<sup>103</sup> C. Lewis, *"Judicial Remedies in Public Law"*, (London, Sweet & Maxwell, 2000), p. 60.

<sup>104</sup> *Ibid*, p. 65.

### **1. Judicial review remedies**

In practice, judicial review is only available for public law matters under two conditions: firstly, the party must be a public entity and, secondly, the decision under challenge must be based on public principles.<sup>105</sup>

Procurement contractors can challenge the acts of the contracting authority through a claim for judicial review. If the contractor feels that the contracting authority has exceeded its statutory powers or breached its contractual obligations, he may file a claim for judicial review to challenge such action. In practice, the contractor must satisfy the court by justifying his challenge of the actions of the contracting authority. For example, when an aggrieved tenderer challenges the tendering procedure which leads to the selection of another tenderer, he is required to satisfy the court that his challenge is not based solely on the fact that he feels the wrong tenderer has been chosen. Usually, the court analyses the actions of the contracting authority, examines the motive for the action, and balances the interests of the contracting authority and the contractor before issuing its judgement. However, there are some reservations about the ability of ordinary judges to resolve procurement disputes in the High Court, which has jurisdiction over procurement contract disputes.<sup>106</sup> One commentator has argued that judges who hear proceedings

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<sup>105</sup> R. Gordon, *"Judicial Review: Law and Procedure"*, (London, Sweet & Maxwell, 2<sup>nd</sup> ed., 1999), p. 133.

<sup>106</sup> Public Works Regulations, Art. 30(5), Supply Regulations, Art. 29(3) and Services Regulations, Art. 32(3).

under procurement regulations possess no special expertise in procurement.<sup>107</sup> Recently, judges have become more fully committed to resolving disputes by alternative means, where appropriate, and are exploring ways of promoting this.<sup>108</sup>

Judicial review remedies are divided into two groups: the first addresses public law remedies and the second addresses private law remedies. Public law remedies, which regulate breaches of public law, formerly known as “prerogative orders”, include the quashing order, prohibiting order, and mandatory order.<sup>109</sup> On the other hand, private law remedies include injunction, declaration and damages. These remedies will provide one or more of the following forms of relief:

- a) Quash, or set aside as a nullity, a decision exceeding the public agencies’ jurisdiction.
- b) Restrain the authority from acting unlawfully.
- c) Order the authority to perform its lawful duties.
- d) Declare the rights and duties of the parties.

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<sup>107</sup> S. Weatherill, *Enforcing the Public Procurement Rules in the United Kingdom*, in: S. Arrowsmith, (ed), *Remedies for Enforcing the Public Procurement Rules*, (Earlsgate, 1993), Ch. 8, p. 271. Professor Arrowsmith supports this view but adds that “the hearing of administrative law cases is now generally assigned to a limited number of judges, who thus have the opportunity to develop a degree of expertise in public law generally”. S. Arrowsmith, *supra* n. 97, p. 97.

<sup>108</sup> Annual Statement from Mr. Justice Scott Baker, Lead Judge of the Administrative Court, London, 1 February, 2002. [www.Courtservice.gov.uk/notices/divis/ACO\\_news\\_annaul\\_statement.doc](http://www.Courtservice.gov.uk/notices/divis/ACO_news_annaul_statement.doc).

<sup>109</sup> In fact, Sir Jeffery Bowman submitted his report “*Review of the Crown Office List: A Report to the Lord Chancellor*, (LDC, 2000) on 2000 recommending some changes in Part 54 of the Civil Procedure Rules. His recommendations were adopted, consequently the previous certiorari became a quashing order, prohibition became a prohibiting order, and mandamus became a mandatory order. See Wade and Forsyth, *supra* n. 102, p. 651, P. Cane, *supra* n. 99, and T., Cornford, *The New Rules of Procedure for Judicial Review*, [2000] 5 *Web Journal of Current Legal Issues*.

e) Order the authority to provide financial redress for loss or damage suffered; and

f) To secure temporary relief.<sup>110</sup>

Before analysing some of these UK remedies, it is worth providing a brief about the availability of remedies to aggrieved contractors under the GPA. The GPA obliges all of its members to establish a challenge procedure to review the complaints of suppliers. In fact, before commencing such litigation, the GPA encourages suppliers and the procuring entity to seek resolution of their complaints.<sup>111</sup> If they fail to reach an agreement, then suppliers may challenge the entity's action to 'a court or an impartial and independent review body'.<sup>112</sup>

Similar to the remedies adopted by the UK court, challenge procedures under the GPA must have power to provide one or more of the following forms of relief:

a. Rapid interim measures, such as suspension<sup>113</sup> of the procurement process, to correct breach of the Agreement and preserve commercial opportunities.<sup>114</sup> However, overriding adverse consequences to the public

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<sup>110</sup> A. Bradly and K. Ewing, "*Constitutional and Administrative Law*", (Essex, Longman, 12<sup>th</sup> ed. 1997), p. 804

<sup>111</sup> GPA, Art. XX(1). For details see S. Arrowsmith, "*Government Procurement in the WTO*", (London, Kluwer Law International, 2003), pp.359-437.

<sup>112</sup> GPA, Art. XX(6).

<sup>113</sup> C. Schede, The 'Trondheim Provision' in the WTO Agreement on Government Procurement: Does this 'Major Revision' Live up to the Needs of the Private Sector?, (1996), 5, *Public Procurement Law Review*, p. CS158.

<sup>114</sup> GPA, Art. XX(7)(a).

interest, may be taken into account in deciding whether such measures should be applied;<sup>115</sup>

- b. An assessment and decision on the merits of the challenge;<sup>116</sup> and
- c. Correction of breach of the agreement or compensation for the loss or damages suffered, which may be limited to the costs for tender preparation or protest.<sup>117</sup> In this regard, the GPA states that damages may be limited to tender costs, but does not clarify what conditions can be placed on the recovery of those costs.<sup>118</sup>

## **2. The requirement of notification**

Before commencing his claim, the contractor is required to inform the contracting authority of his intention to bring proceedings against it.<sup>119</sup> Unlike under Saudi procurement regulations, under UK regulations, the contractor has an obligation to submit a claim to the contracting authority disputing its decision.<sup>120</sup> In turn, the authority should answer the contractor's complaint.<sup>121</sup> This includes an implied obligation for the contracting authority to inform all other contractors and sub-contractors about the contractor's claim. If the contractor is not satisfied with the contracting authority's justification for its

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<sup>115</sup> *Ibid*, Art. XX(7)(a).

<sup>116</sup> *Ibid*, Art. XX(7)(b).

<sup>117</sup> *Ibid*, Art. XX(7)(c).

<sup>118</sup> I. Dendauw, *supra* n. 113, p. 260.

<sup>119</sup> Public Works Regulations, Art. 30(5)(a) and Services Regulations, Art. 32(3)(a).

<sup>120</sup> Public Works Regulations, Art. 31(5) and Services Regulations, Art. 32(4)

<sup>121</sup> *Ibid*.

decision, he then has the right to take his claim to the High Court, or the Court of Session if the contract is executed in Scotland.

The regulations do not clarify the consequences if the contractor does not inform the contracting authority of his intention to bring proceedings against it. However, the contractor's failure to inform the contracting authority of his intention may lead to him losing the case. Also, informing the contracting authority of his intention indicates his desire to settle the matter out of the court rather than embark on the Court proceedings. The contractor may save time and additional costs if he negotiates with the contracting authority regarding its decision.

### **3. Time limits**

If the tenderer or the contractor has been injured by the action of the contracting authority, he is entitled to challenge such action within a limited time period specified by the regulations.

The proceedings must be initiated by a written petition and made promptly or within three months from the date when grounds for the proceedings first arose.<sup>122</sup> Accordingly, the time period does not run from the date when the contractor first learnt of the action of the contracting authority

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<sup>122</sup> Public Works Regulations, Art. 30(5)(b), Supply Regulations, Art. 29(3)(b) and Services Regulations, Art. 32(3)(b).

nor from the date when he considers that he has adequate information to bring the claim.<sup>123</sup>

The wording of the regulations requires further clarification.

The regulations make it clear that the time limit for the proceedings runs from the time that the grounds for the claim first arise, in other words, when the contracting authority first committed the action. In fact, the regulations tie the proceedings' limit to the action of the contracting authority not to the knowledge of the contractor. It is difficult, sometimes, to prove when the contractor learnt about the contractual decision. Therefore, the regulations enable the contractor to challenge the action of the government immediately after the decision has been made, or within three months. However, the GPA applies the opposite approach. It requires the aggrieved contractor to challenge the action of the contracting authority within 10 days of his knowledge of such action. Article XX.5 states: 'the interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of 10 days'.<sup>124</sup> Thus, the 10 days appears to start from the time when the supplier knew or should reasonably have known of the basis of the complaint, and not to the time of decision of the procurement entity.<sup>125</sup>

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<sup>123</sup> *R v. Secretary of State for Transport, ex p. Presvac Engineering Ltd* (1991) 4 Admin L. Rep. 121 at 133-134.

<sup>124</sup> GPA, Art. XX.5.

<sup>125</sup> S. Arrowsmith, *supra* n. 111, p. 397.



Specifying a particular time for proceedings is very important for both parties, the contractor and the contracting authority. It encourages the aggrieved contractor to attempt to limit the consequences of the action and draw the attention of the contracting authority to the consequence of its decision. The contractor is required to challenge the governmental decision promptly within the specified period because if the time expires without such challenge he may lose his right to initiate an action. On the other side, "the public authority should not be kept in suspense as to the legal validity of a decision which the authority has reached in its purported exercise of decision making power for any longer than is absolutely necessary in fairness to the person affected by the decision".<sup>126</sup>

The regulations give the contractor three options for challenging the contracting authority's decision: to proceed promptly or within three months of the date of the decision, or after three months if he can provide "good reason"<sup>127</sup> for not proceeding within the three months.

Before illustrating these methods of proceedings, it should be noted that specifying a limited time for challenging governmental action indicates that the law-makers have distinguished between two types of situation: the need for prompt action when the decision of the contracting authority may cause irreparable harm and produces injury as soon as it is carried out; and the need for less urgent action when the contracting authority's action makes the

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<sup>126</sup> *O'Reilly v. Mackman* (1983) 2 AC, 237.

<sup>127</sup> Civil Procedure Rules, Rule 3.1(2)(a).

contractor suffer but does not impede performance of the contract. In the latter case, the contractor may raise his action within three months.

The regulations require the contractor to bring his claim "promptly". However, a claim will not be made promptly simply because it has been made within the three months period.<sup>128</sup> In practice, actions need to be brought promptly, because non-financial relief is unavailable once a contract has been concluded.<sup>129</sup>

The regulations give the court the power to extend the time if the contractor delays in disputing the decision after the three months have expired. There, however, are two conditions for such extension. Firstly, the contractor must justify his delay and provide "good reason" in order for the court to be satisfied and extend the time. Nonetheless, the regulations do not provide any definition or guideline to clarify the "good reason" and leaves such determination to the discretion of the court. Secondly, the court should ensure that extending the time limit will not cause substantial hardship, prejudice against, or detriment to the contracting authority. In practice, the courts have refused to accept there was good reason for extending the time for making a judicial review application because the delay was the fault of the applicant's lawyer.<sup>130</sup> In another case, the courts accepted the request to extend the time limit because the delay was

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<sup>128</sup> *R v. Independent Television Commission, ex p. TV NI Ltd.*, *The Times*, December 30, 1991.

<sup>129</sup> S. Arrowsmith, *"the Law of Public and Utilities Procurement"*, (London, Sweet & Maxwell, 2<sup>nd</sup> ed, 2005), p. 907.

<sup>130</sup> *R v. Secretary of State for Health, ex p. Furneaux* [1994] 2 ALL E.R. 652.

caused by factors outside the applicant's control, such as delay in obtaining legal aid.<sup>131</sup>

To conclude this section, it should be pointed out that the House of Lords made a comparative analysis of the relationship between section 31(6) of the Supreme Court Act 1981 and Order 53 of the former Act and held that if an application was not made promptly or within three months, there was undue delay for the purpose of extension... even if there were good reasons for the granting of the extension...the courts could either refuse permission or refuse a remedy at the substantive hearing if there were the requisite prejudice, hardship or detriment.<sup>132</sup>

#### **4. Interim relief**

Generally, similar to Saudi procurement regulations, UK regulations have adopted the interim relief measure as a way of protecting the rights of contractors. An interim relief is granted for a particular period between the commencement of the action and the final judgement. Its effect must not extend beyond this period.

UK procurement regulations expressly confer on the High Court the power to grant an interim order to suspend the procedure leading to the award of the contract ... or to suspend the implementation of any decision or action taken by

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<sup>131</sup> *R v. Stanford-upon-Avon District Council, ex p. Jackson* [1985] 1 W.L.R. 1319.

<sup>132</sup> *R v. Dairy Produce Quota Tribunal for England and Wales, ex p. Caswell* [1990] 2 A.C. 738.

the contracting authority...<sup>133</sup> The aggrieved contractor, as mentioned in Chapter 7, has the right to seek to suspend the action of the contracting authority if such an action includes irreparable harm for which damages would not be an adequate remedy to satisfy his injury. Article 31(6)(a) mentioned above, and identical articles in Supply and Services Regulations, include several factors which deserve further illustration.

Neither Article 31(6)(a) nor identical articles under Supply and Services regulations, provide sufficient instructions on how to grant such relief. However, in addition to the procedures provided by the Civil Procedure Rules, the House of Lords in *American Cyanamid v. Ethicon*<sup>134</sup> provided measures for granting such relief. Hence, once the claimant requests the interim relief, the court is required to decide whether damages would provide an adequate remedy for the contractor before commencing the case. If the court decides that the damages will be adequate, then the interim relief will be withheld. On the other hand, if the damages are not considered adequate, then the court is required to investigate the positive and negative consequences of its decision to the parties before granting such an interim measure.

The contractor requesting an interim relief measure is seeking to obtain many advantages, such as:

- a. To correct the action of the contracting authority or to prevent further damages resulting from such action.

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<sup>133</sup> Public Works Regulations, Art. 31(6)(a), Supply Regulations, Art. 29(5)(a) and Services Regulations, Art. 32(5)(a).

<sup>134</sup> *American Cyanamid v. Ethicon* [1975] AC 396

- b. To set aside any unlawful decision which may cause serious difficulties and impede the performance of the work.
- c. An order for the payment of damages to any person harmed by an infringement.<sup>135</sup>

Article 31 (6) of the Public Works Regulations confers on the court the power to “order the setting aside of that decision... or order the contracting authority to amend any document,... or do both of these things ”.<sup>136</sup> Therefore, the alteration of the public decision, or to set it aside, or both of these remedies are available to the aggrieved contractor.

Accordingly, the contractor must satisfy the court that the contracting authority has infringed its duty. Consequently, the court “may order the setting aside of the decision or action under challenge in order for the contracting authority to amend any document”.<sup>137</sup> If the contracting authority sets aside the challenged action then the contracting authority must suspend it. Therefore, the contracting authority has no right to implement the decision which has been set aside, but to correct it.

Moreover, the regulations empower the court to amend the action of the contracting authority, or to “amend any document” related to the procurement

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<sup>135</sup> M. Bowsher, Prospects for Establishing an Effective Tender Challenge Regime: Enforcing Rights under E.C. Procurement Law in English Courts, (1994) 3 *Public Procurement Law Review*, p. 35.

<sup>136</sup> Public Works Regulations, Art. 31(6)(b), Supply Regulations, Art. 29(5)(b), and Services Regulations, Art. 32(5)(b).

<sup>137</sup> Public Works Regulations, Art. 31(6)(b), Supply Regulations, Art. 29(5)(b) and Services Regulations, Art. 32(5)(b).

contract. For example, to order the authority to replace discriminatory specifications with non-discriminatory ones.<sup>138</sup>

In fact, this is a wide power given to the contracting authority, because it has the right to intervene in the execution of the contract in order to amend the document under challenge. In fact, it is common for procurement contracts, especially construction and public works, to contain wrong information, i.e. specifications, and this obliges contractors to inform the contracting authority about such mistakes. Therefore, giving the court the power to “amend any document” may limit the power of the contracting authority and require the court to review every single document, especially if the contractor is unhappy with the documents of the contract. Accordingly, it is submitted that the regulations should provide further interpretation for “any document” and give clear guidance for the court regarding the documents of procurement contracts.

It should be pointed out that the wording of the regulations leaves the decision to set aside the action under challenge to the discretion of the court. The regulations state that the court “may” order the setting aside of the challenged decision. Accordingly, the court has the choice to set aside the decision or not. Likewise, judges of the Board enjoy similar power. In other words, they have free discretion to set aside or not the challenged decision.

A contractor may claim interim relief in two circumstances: either before the claim starts or after judgement has been given.<sup>139</sup> Prior to requesting such

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<sup>138</sup> D. Pachnou, *supra* n. 96 p. 35.

<sup>139</sup> Civil Procedure Rules 1998, Rule 25.2 (1)(a and b).

relief, the contractor is obliged to provide the reason for requesting interim relief and to support his request by evidence.<sup>140</sup> If the interim relief is granted before the proceedings, the claimant normally gives an undertaking to pay damages because if he loses the case the other party will be compensated for any loss suffered during the restrained period.<sup>141</sup>

Unlike Saudi judicial procedures, UK Civil Procedure Rules allow the contractor to request an interim remedy before the proceedings start in two cases: (i) if the matter is urgent, or (ii) it is otherwise necessary to do so in the interests of justice.<sup>142</sup> In fact, it is the role of the court to assess the urgency of the matter before granting such relief.

Accordingly, the contractor must have a genuine reason for asking for interim relief. In fact, these articles distinguish between two situations: tendering procedures and awarding the contract procedures. In tendering procedures, the tenderer has the right to challenge the decision of the contracting authority if he has been excluded from the tendering competition. Under the awarding of the contract procedures, the contractor has the right to suspend the action of the contracting authority to avoid any irreparable harm to their performance.

Once the contractor has requested interim relief, two factors must be taken into account,<sup>143</sup> the legality of the request and the contracting authority's ability to provide this. According to the first factor, the contracting authority must

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<sup>140</sup> *Ibid*, Rule 25.6 (4).

<sup>141</sup> *Hoffman-La Roche & Co. v. Secretary of State for Trade and Industry* [1975] AC 295.

<sup>142</sup> Civil Procedure Rules 1998, Section 25.2 (2)(b) (i)(ii).

<sup>143</sup> L Gormley, *The New System of Remedies in Procurement by Utilities*, 1 *Public Procurement Law Review*, p. 263.

be in “breach of the duty pursuant to the (procurement) regulations”. The effectiveness of such breach must be direct and executable pursuant to the second factor. Subsequently, once the court reviews the legality of the authority’s action and its effect, it will proceed to consider whether damages would be an adequate remedy for the contractor. If it decides so, there is no need to grant him interim relief in order to protect his interests.<sup>144</sup> The court will refuse to grant an interim measure where damages are an adequate remedy.<sup>145</sup>

Before granting or rejecting interim relief, the court is obliged to assess the balance of convenience between the parties.<sup>146</sup> The court should take into consideration the individual interests of the parties to the contract. The court is required to determine the effects of granting or rejecting such relief on the concerned parties. If the court considers that the impact of issuing the interim relief will have a detrimental effect on the contractor, it may decide not to issue it. Moreover, the court should take the public interest into consideration if it decides to reject or grant such a measure. It has been submitted<sup>147</sup> that the courts are likely to take a reasonably flexible approach at the interlocutory hearing determining whether a particular complainant should be granted interim relief for breach of contract.

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<sup>144</sup> S. Arrowsmith, *supra* n. 135, p. 912.

<sup>145</sup> *Burroughess v. Oxford Area Health Authority*, July 21, 1983, cited in S. Arrowsmith, *Ibid.* p. 889.

<sup>146</sup> H. H. Wade & C. Forsyth, *supra* n. 102, p. 556.

<sup>147</sup> M. Bowsher, *supra* n. 135, p. 36.



## **5. Damages**

Generally, contractors have the right to damages if the contracting authority has failed to fulfill its contractual obligations. In this context, procurement regulations empower the court, in addition to setting aside the decision or action under challenge, the power to award damages to the contractor who has suffered loss or damages as a consequence of the breach.<sup>148</sup> In practice, the aggrieved contractor is responsible for proving to the court the breach of a contracting authority. In addition, he is also required to suggest the appropriate basis for the calculation of his damages.<sup>149</sup> In fact, breach of procurement obligations under UK regulations may be deemed to be a tortious breach of statutory duty.<sup>150</sup> Consequently, a claimant who suffers from breach of duty is able to recover the loss incurred because of that breach.<sup>151</sup> Procurement contractors may bring their claims for breach of procurement obligations in tort.<sup>152</sup> Accordingly, a bidder who has not submitted a tender, and claims that he would have done so were it not for the breach of procurement rules, is only able to bring his claim in tort.<sup>153</sup>

Pursuant to the procurement regulations requirement, the contracting authority must have taken an action that has infringed its contractual obligations, which, in turn, has affected the performance of the work and led to the

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<sup>148</sup> Public Works Regulations, Art. 31(6)(b)(iii), Supply Regulations, Art. 29(5)(b)(iii), and Services Regulations, Art. 32(5)(b)(iii).

<sup>149</sup> In fact, UK procurement regulations do not include any measure or method to calculate damages.

<sup>150</sup> S. Weatherill, *supra* n. 107, p. 287.

<sup>151</sup> *Hotson v. Berkshire AHA* [1987] AC 750.

<sup>152</sup> The Scottish equivalent for tort is *delict*.

<sup>153</sup> M. Bowsher, *supra* n. 135, p. 38.

contractor suffering loss as a result of that action. In practice, contractors usually try to solve their procurement disputes amicably with the contracting authority. If they fail to reach a satisfactory agreement then they may proceed in order to obtain the damages remedy. However, similar to the case of setting aside an action under challenge, the procurement regulations state that the court “may” award damages, in other words, the court is empowered to award or to reject damages. However, it has been argued that the decision to grant damages is not normally regarded as discretionary remedy under English law because it is unlikely to give the court the decision to refuse damages once the contractor has proved his suffering.<sup>154</sup>

In fact, there is no general right to damages for loss caused by unlawful administrative action under UK regulations. A breach of procurement regulations would appear to be a breach of tort under statutory duty.<sup>155</sup> It has been suggested<sup>156</sup> that a claim for breach of duty might be brought by procurement tenderers, based on the theory that where tenders are sent to the contracting authority as the result of an invitation to tender, tenderers are entitled to have their tenders opened and considered together with all other conforming tenders.<sup>157</sup>

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<sup>154</sup> S. Arrowsmith, *supra* n. 97, p. 107.

<sup>155</sup> It is worth noting that Articles 31(3) of Public Works and 29(2) of Supply and Services Regulations stipulate that a breach of duty is not viewed a criminal offence. However, such breach is actionable by a contractor who suffers loss or damage.

<sup>156</sup> S. Weatherill, *supra* n. 107 p. 290.

<sup>157</sup> M. Bowsher, *supra* n. 135, p. 38.

The motive behind the damages is to correct the action of the contracting authority by putting the contractor in the position he would have been had the breach not occurred. According to McGregor:<sup>158</sup>

In contract, the wrong consists not in the making but in the breaking of the contract and therefore the plaintiff is entitled to be put in the position he would have been in if the contract had never been broken, or, in other words, if the contract had been performed. The plaintiff is entitled to recover damages for the loss of his bargain.

Moreover, the regulations do not clarify the basis for calculating such damages, nor the factors which govern the award of such damages.<sup>159</sup> Due to such omission, it is the court's role to provide leading principles to be followed when contractors request damages. However, a distinction needs to be made between the breach of tender procedures and the breach occurring after the contract has been awarded. In the first case, the aggrieved tenderer possesses the right to have his tender evaluated and to get back costs incurred in preparing his tender. The aggrieved tenderer must prove three solid grounds for the court to alter the contracting authority's decision: 1- that he would have been awarded the contract if he had not been excluded;<sup>160</sup> 2- he satisfied the tendering procedures;<sup>161</sup> and 3- he can prove negligence on the part of the contracting authority.<sup>162</sup> If he fails to provide these grounds, the court may reject his claim to have his tender re-evaluated. In the second case, where the contracting

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<sup>158</sup> H. McGregor, "McGregor on Damages", (London, Sweet & Maxwell, 17<sup>th</sup> Ed., 2005), p. 486.

<sup>159</sup> S. Weatherill, *supra* n. 107, p. 287.

<sup>160</sup> L Gormley, *supra* n. 143, p.263.

<sup>161</sup> *Blackpool and Fylde Aero Club Ltd. V. Blackpool BC* [1990] 1 W.L.R. 1195.

<sup>162</sup> D. Longly & R. James, "Administrative Justice: Central Issues in UK and European Administrative Law", (London, Cavendish Publishing Limited, 1999), p.114.

authority has infringed its contractual obligations during the performance of work, it is more difficult to measure the damages to be awarded the contractor.

As mentioned above, remedy damages are limited under English Administrative Law. An aggrieved tenderer who has submitted a tender and is unlawfully excluded from tendering procedures will have his damages limited to the cost of preparing his tender. However, the *Blackpool judgement*,<sup>163</sup> explained in detail in Chapter 3, was issued in 1990 and established a general rule on liability for unlawful contracting conduct. An invitation to submit tenders was sent by a local authority to seven tenderers. It stated that tenders submitted after a specified deadline would not be considered. The plaintiff submitted his tender but was mistakenly treated as late and excluded from the consideration. The Court of Appeal held that where a bid is submitted in response to an invitation to tender, there is an implied contract between the bidder and the contracting authority, binding the authority to at least consider the submitted bid. If the authority fails to do so, it is liable to pay the injured contractor damages for breach of the implied contract.

#### **6. Remedies once a contract has been concluded**

Once the contract has been concluded, the aggrieved party may face difficulty setting it aside because the regulations limit the power of the court to award damages since the once the parties to the contract have signed it. Article 31(7) of the Public Works Regulations expressly prevents the court from

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<sup>163</sup> *Blackpool and Fylde Aero Club Ltd. V. Blackpool BC* [1990] 1 W.L.R. 1195.

remedying a contractor for breach of the contract has been concluded, except in one case where he may be granted damages. It indicates the court shall not have the power to award any remedy in respect of breach of contract other than an award of damages. Article 31(7) of the Public Works Regulations states: "In proceedings under this regulation the Court shall not have power to order any remedy other than an award of damages in respect of a breach of the duty".<sup>164</sup>

The main justification for this is to protect the party with whom the contract has been concluded.<sup>165</sup> The security of the contract once concluded is important for long term administrative and commercial planning.<sup>166</sup> However, it should be possible for the court to set aside the contract if an offence/ crime is committed, even if it has been signed.

## **7. The requirement to enforce foreign judgements in the UK**

Similar to Saudi practice, a foreign judgement is not automatically enforceable in the UK. Many conditions must be satisfied before such judgement is enforced. In general, the conditions which regulate the enforcement of foreign judgements are similar in the two legal systems.

The UK is a member of several international treaties and conventions recognising and enforcing foreign judgements and arbitral awards. Most notably, these include the Foreign Judgements (Reciprocal Enforcement) Act 1933, which

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<sup>164</sup> Public Works Regulations, Art. 31(7), Supply Regulations, Art. 29(6), and Services Regulations, Art. 29(6).

<sup>165</sup> S. Arrowsmith, *supra* n. 97, p. 101.

<sup>166</sup> Weatherill, *supra* n. 107 p. 283.

is a virtual codification of the common law, and regulates the recognition and enforcement of the judgements of some Commonwealth countries and judgements given by some non-Commonwealth countries, including countries in Western Europe;<sup>167</sup> Regulation 44/2001 of December 22, 2000, on Jurisdiction and Enforcement of Judgements in Civil Commercial Matters (the Council Regulation); the Brussels Convention of September 27, 1968; the Lugano Convention, implemented by the Civil Jurisdiction and Judgements Act 1982, and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958.

A foreign judgement must first be recognised by the UK court in order to be enforced. A court must recognise every foreign judgement which it enforces, but it need not enforce every foreign judgement which it recognises.<sup>168</sup> In principle, the court has the right to refuse to recognise a foreign judgement if the judgement is contrary to the public policy of the country concerned.<sup>169</sup> In fact, this condition is equivalent to the Saudi Board of Grievances' refusal to enforce a foreign judgement which is contrary to the Islamic Sharia'h. Moreover, the High Court or the Court of Session may deny recognition of the judgement of a foreign court on the grounds that the proceedings in the foreign court are

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<sup>167</sup> C. Clarkson and J. Hill, "*Jaffey on the Conflict of Laws*", (London, Butterworth, 2<sup>nd</sup> Ed, 2002), p. 152.

<sup>168</sup> J. Morris, D. McClean, and K. Beevers, "*The Conflict of Laws*", (London, Sweet & Maxwell, 6<sup>th</sup> Ed, 2005), p. 148.

<sup>169</sup> The Council Regulation, Arts. 34.

inconsistent with the right to a fair trial set out in the European Court of Human Rights.<sup>170</sup>

A foreign judgement can be enforced in the UK by action at common law or, in cases to which it applies, by registration under the Administration of Justice Act 1920, or the Foreign Judgements (Reciprocal Enforcement) Act 1933.<sup>171</sup>

In order for a foreign judgement to be enforced in the UK it must satisfy three conditions:<sup>172</sup>

1. The court which issued a foreign judgement must be a court of competent jurisdiction;
2. The foreign judgement must be final and conclusive; and
3. The foreign judgement proceedings must have been between the same parties and involved the same cause of action or the same issue.<sup>173</sup>

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<sup>170</sup> P. Stibbard, Sharia'h Law Dispute over English Will Trust on Domicile, 5 (2005) *Private Client Business*, p. 256.

<sup>171</sup> J. Morris, D. McClean, and K. Beevers, *supra* n. 1168, p. 169.

<sup>172</sup> The Council Regulation, Arts. 32-37.

<sup>173</sup> A. Briggs, *"The Conflict of Laws"*, (Oxford, Oxford Press, 1<sup>st</sup> Ed, 2002), p. 117.

### **III. Comparative analysis**

In addition to the comparative analysis of Saudi and UK systems provided throughout this chapter, this section will focus on similarities and differences between contractors' right to obtain remedies under the two systems.

The two systems are similar in their lack of detailed regulations. In fact, neither Saudi Arabia nor the UK has created separate regulations to deal with remedies. Law-makers in the two systems have empowered the courts to try public procurement disputes and given them responsibility for assessing the remedy. To this end, court judgements and case law have great impact on developing the UK remedy system. The judgements of the Board of Grievances, in contrast, have no influence on development of the remedy system in Saudi Arabia because the Board has adopted a clear system for remedy nor to published its judgements, which prevents researchers, academics and lawyers analysing such judgements to develop the remedy system.

Types of remedy are clear and specified under UK regulations. However, remedies under Saudi regulations are largely neglected by academics and researchers. One is required to analyse the Board's judgements in detail in order to clarify and distinguish the remedies that contractors may have the right to obtain.

In general, types of remedy under Saudi and UK systems possess many similarities. Courts under the two systems have the power to set aside the unlawful action of the contracting authority or restrain it from acting unlawfully.



Further, courts possess the authority to order the contracting party to perform its lawful duties and to declare the rights and duties of the parties to the contract. Once a court decides that the aggrieved party has suffered from an action of the government, they may remedy his suffering by providing financial redress for loss or damage suffered. Also, contractors have the right to request to secure temporary relief and suspension of the decision of the contracting authority's decision in order to prevent additional damages.

Transparency of the regulations and power of the courts are significant features of UK regulations, whereas Saudi regulations do not have clear procedures for implementing remedy measures. UK procurement regulations clearly give the court power to set aside challengeable action, to amend the contracting authority's decision, and to grant or to reject damages, while Saudi regulations remain silent in this regard. However, Board judgements show that it has the power to set aside or amend challenged action, and to grant or reject damages.

A comparison between the interim relief procedures under Saudi and UK judicial systems exposes the weakness of the Saudi system. While the UK Civil Procedure Rules provide detailed procedures to guide judges to grant or reject such relief, Saudi procedures do not provide any guidance or framework for such relief. They leave the assessment to grant or reject it to the discretion of judges.

The intervention of the appellate courts in the litigation procedure is similar under the two systems. In practice, in both Saudi Arabia and the UK,

once the court has issued its judgement, a litigant has the right to appeal within a specified period. The judgement will become final if an appeal is not made within this period. However, there is a critical difference between the two systems. Under the Saudi system, if the judgement is issued against a contractor he is responsible for presenting an appeal to the Review Committee of the Board. If the judgement issued against the contracting authority, then the Board itself will present the appeal on behalf of the contracting authority if the latter does not do so.

Another difference between the two systems is the requirement of notification. The UK system requires contractors to inform the contracting authority of their intention to sue it in order to get its decision set aside or altered. This obligation opens the door wide for parties to the contract to resolve their disagreement to avoid the need to go to the court. Contractors will save time and costs if they reach a settlement with the contracting authority out of court. The Saudi system, in contrast, does not have a similar requirement. Contractors have the option to make a claim against the contracting authority or to sue it directly without notifying it of their intention to challenge its action. In fact, contractors under the Saudi procurement systems waste time and money because the law does not encourage settlement between the parties to the contract out of the court, which, in turn, imposes additional cost on the public budget.

The enforcement of foreign judgements against contracting authorities under the two systems is governed by local regulations and international treaties. In general, many requirements regulate the enforcement of foreign judgements in the courts of the two procurement systems. First, there must be reciprocity between the UK or the Saudi government and the country of a foreign plaintiff to enforce foreign judgements in both countries. In addition, foreign judgements must not conflict with the general law of the country. In the case of Saudi Arabia, foreign judgements must not conflict with Islamic law. A foreign judgement must be final and issued by a court of competent jurisdiction.

### **Summary**

This chapter has presented and discussed final stage in the performance of procurement contracts. The first seven chapters have dealt with contracting procedures from the first stage of preparing a tender through to selecting a successful contractor and commencing execution of the contract. However, contracting dispute is usual practice in most procurement contracts. In fact, it is normal in most procurement contracts that one party will not be content with the performance of the other party. There are therefore many ways to solve contracting disputes, one of which is to challenge the action of the other party before a specialist court and sometimes to obtain remedy.

This chapter has investigated the rights of contractors under Saudi and UK procurement contracts to obtain remedy. The first part examined methods for obtaining remedy for breach of contract under the Saudi procurement system and the second analysed the rights of contractors to obtain remedy under UK procurement regulations.

Although contractors under the Saudi system have the right to obtain a remedy, regulations lack clarity regarding such remedy. Moreover, existing regulations have received scant attention in the legal literature and are largely neglected by academics, researchers and specialists.

Moreover, the Saudi judicial system does not provide detailed procedures to guide judges to grant or reject an interim relief, a mandatory order or damages. In fact, they leave such assessment to the discretion of judges. It is therefore recommended that to protect the rights of contractors a framework should be provided to guide contractors, lawyers, and specialists on how such remedies should be obtained and assessed.

Finally, foreign litigants may find enforcement of a foreign judgement difficult in Saudi Arabia. In fact, three conditions must be satisfied before a foreign judgement is enforced in Saudi Arabia. There must be reciprocity between the Saudi government and the country of the foreign plaintiff foreign judgements must not conflict with Islamic law, and foreign judgements must be issued according to judicial procedures. In fact, the most important condition is that foreign judgements must not contradict Islamic law, otherwise they will not

be enforceable in Saudi Arabia. However, if this condition is satisfied but one of the others is not, then the foreign litigant must commence a new hearing before the Board, even if the foreign judgement is final.

## Chapter Ten

### Summary and Conclusion

## **Chapter Ten: Summary and Conclusion**

This thesis has explored public procurement contract regulations in Saudi Arabia. It has focused on the rights of tenderers and contractors under such regulations, comparing them with similar rights under UK procurement contract regulations. A central aim of this thesis has been to answer the question: Are Saudi procurement regulations in general, and the Purchasing Law in particular, able to protect the rights of local and foreign contractors?

Rapid development in procurement and the economy in Saudi Arabia in particular, and the world in general, exposes weaknesses in Saudi procurement contract regulations due to their failure to remain abreast of such development. Moreover, their weaknesses and loopholes have a negative influence on the development of the local procurement market, are obstacles to the efficiency of local contractors, and deter local and foreign contractors from participating in the Saudi procurement market.

The foregoing chapters above have offered explanations of some of the rights of tenderers and contractors under Saudi procurement contract regulations and suggested what can be done to protect such rights. The present chapter will be divided into four parts: the first overviews the findings and conclusions drawn from previous chapters; the second summarises the study's contributions to the procurement sector; the third recommends areas for future research; and the fourth presents general recommendations to improve public regulations and policy.

**A. An overview of main findings**

In general, criticisms and suggestions made throughout the present study, have not only offered an analytical insight into the procurement sector and drawn attention to areas where reform is necessary, but also emphasised the importance of this sector in Saudi Arabia. Accordingly, on the basis of criticisms and suggestions presented in this study, it is argued that this thesis as a whole provides a meaningful foundation for reform in the Saudi procurement sector in general, and identifies the need to focus on the rights of tenderers and contractors in particular.

UK procurement contract regulations have been selected as a model or benchmark to reforming Saudi procurement regulations because they are more advanced and useful lessons have been drawn from them to remedy weaknesses in Saudi regulations. Comparisons have been made to identify strengths in UK procurement regulations to transfer them to Saudi procurement regulations. Various ways of effecting legal reforms within the Saudi procurement sector have therefore been considered.

The many criticisms and suggestions offered in this study can be grouped under five main headings:

**1. Saudi procurement law is outdated**

Chapter two indicated that the most recent Saudi procurement regulation, which regulates procurement contracts in the country, the Purchasing Law, is, in fact, 26 years old. It has regulated procurement activities since 1979 without



major change, in spite of daily changes in the Saudi and world economy. As a result, there is a need to reform it for at least four reasons:

**Firstly,** in order to comply with GPA requirements to facilitate Saudi membership of the GPA. Saudi Arabia has joined the WTO on 11 November, 2005 and, as a condition of entry to the WTO, will commence negotiations to join the GPA in 2007 as mentioned in chapter one. Each signatory member to the GPA must provide similar treatment to local firms or third parties. Complaints from Saudi contractors about intense competition from foreign contractors have forced the Saudi government to adopt discriminatory policies against foreign contractors and products because foreign firms are large firms, and have modern hi-tech and rich procurement experience because of their capacity to participate in various international markets. The Saudi government has consequently enacted many provisions and policies to exclude foreign contractors from competing against Saudi firms for procurement projects. Joining the GPA will require the country to eliminate all trade barriers and treat local and foreign contractors alike. Thus, local contractors will no longer enjoy preferential treatment. Prompt reform to develop Saudi procurement regulations will give local contractors sufficient time to prepare themselves for foreign competition and assist the government in overcoming any negative impact which may result from Saudi Arabia joining the GPA. The government should therefore embark on an extensive awareness campaign through courses, speeches and lectures, highlighting the likely impacts on the country of its membership of the GPA, in

particular, on the local procurement sector. The Saudi Chamber of Commerce must encourage small firms to merge and unite with each other in order to be able to successfully compete against foreign contractors.

**Secondly,** because of changes in the world economy that affect the procurement process.

The study findings clearly show that in light of the modern economy, globalisation the Purchasing Law no longer effectively regulates the Saudi procurement sector. This study has made clear that the Purchasing Law has many weaknesses and loopholes and is thus in urgent need of reform. In fact, it has a negative influence on the development of the local procurement market and is an obstacle to the efficiency of local contractors. Globalisation requires countries to reform their systems and public organisations in order to meet the many challenges presented by the rapid development of the world's economy. However, the Saudi government has built an iron wall around the procurement sector in the last two decades which has hindered its modernisation. Although in the last five years, the country has taken steps to reform some of the public sector and to privatise some of its public organisations, the procurement sector still remains in need of urgent reform to meet the many challenges presented by rapidly changing economic conditions.

**Thirdly,** the absence of a modern procurement strategy.

Despite the Saudi procurement sector's long history, all public agencies apply practice that accords with early procurement regulation. There has been no development of a procurement strategy for the sector. The comparative study presented in this thesis may help the Saudi government follow the path of the UK government in its adoption of an annual strategy plan. As indicated in chapter two, the UK government formulates an annual strategy plan to develop the procurement sector. It concentrates on three pillars: an annual review of procurement contracts, accountability, and special emphasis on training provision and developing the professional skills of government procurement employees. In order to develop the Saudi procurement sector, it is recommended that the Saudi government benefits from the procurement policy of the UK government and sets an annual strategy plan to promote development of this sector. Such a plan would maximise the opportunity to improve the quality of the procurement sector in the country as a whole.

**Fourthly,** findings in chapters three and six indicate that the Saudi Purchasing Law requires the contracting authority to publish procurement opportunities in the *Official Gazette* or in local newspapers only. Tenderers are not permitted to send their tenders through telex, telegram or telefax, or through electronic email. It is recommended that the Purchasing Law take into account rapid development in communication and permit tenderers to use the latest technology. The purpose of such publication is to attract the attention of

the largest number of contractors and encourage them to participate in the tendering process. Therefore, procurement regulations should be flexible and allow the use of modern technology to advertise tender opportunities. One main reason for the Purchasing Law not permitting utilisation of rapid communication devices is its lack of reform since its enactment in 1979.

## **2. The equal treatment principle is not fully implemented**

Chapter four indicates that although equal treatment is deemed an important principle under the Purchasing Law, this Law does not specify any particular requirement to which the contracting authority must adhere in order to comply with the equal treatment obligation. Nevertheless, analysis of the various provisions of the Purchasing Law reveals that the public agencies are required to provide the same information about procurement activities to all interested contractors, to hold a procurement competition open to all interested contractors, and to evaluate tenders on the basis of objective criteria. Notwithstanding, the findings of this study show that the equal treatment principle is not fully complied with because of the following reasons:

**First**, there are examples of where the contracting authority and contractors are treated unequally in the procurement process, for example, in the case of delay fine. Findings in chapter eight indicate that the Purchasing Law includes partial provisions regarding the delay fine. A contracting authority has the power to penalise the contractor by applying the delay fine if he fails to complete the work by the agreed date, but the contractor has no power to seek

compensation from the public authority if it fails to fulfil its contractual obligations, unless he obtains prior approval from the court to seek redress. It is therefore recommended that law-makers change the provisions under the Purchasing Law in this respect and give contractors the right to directly seek remedy for the contracting authority's failure to keep to its contractual obligations without having to obtain prior approval from the court to seek redress.

**Second,** findings in chapter six show that the Purchasing Law includes provisions which conflict with some government policies. Although the Purchasing Law supports preferential policies which discriminate in favour of Saudi products and contractors, it prevents small firms from participating in large procurement projects. It is emphasised in article (3) that large projects which require the execution of civil, mechanical and electrical works are to be performed by international firms. Such discrimination impedes development of the procurement sector. The Purchasing Law thus allows some public agencies to breach the protection policy intended to favour small firms.

**Third,** the equal treatment principle is breached under the suspension procedure. Findings in chapter eight show that the contractor has no right to suspend performance of the contract, even if the contracting authority has breached its contractual obligations. The contractor is required to send a letter to the contracting authority, requesting it to keep to its contractual promises, and to approach the Board to obtain a judicial decision to suspend the work. If the

contractor does not send such a letter to the contracting authority he has no right to compensation for the contracting authority's breach of its contractual obligations according to Article 59 of the Saudi Public Works Contract Standard. On the other hand, the contracting authority has the power to suspend the contract after sending a letter to the contractor reminding him of the need to perform his contractual obligations.

**Fourth,** the principle of equal treatment does not apply to sub-contractors. Saudi and UK procurement systems pay little attention to the rights of sub-contractors. In fact, procurement regulations in the two systems include no provision protecting the rights of sub-contractors. It is therefore recommended that Saudi law-makers pay much more attention to regulating sub-contractors' rights and obligations during performance of procurement contracts.

Moreover, main contractors do not apply the equal treatment principle when dealing with sub-contractors since they directly select them to perform the work without and do not invite other sub-contractors to submit tenders. In order to apply the equal treatment principle by extending the tendering invitation to all interested sub-contractors, it is recommended that the government issue general rules regulating the sub-contracting agreement which request main contractors to publicise their work in order to receive tenders from many different sub-contractors. This will ensure the main contractor selects a qualified sub-contractor to perform the work required.

**Fifth**, according to chapter five findings, Saudi and UK, GPA, and EC procurement regulations adopt equal treatment as a fundamental principle, yet discriminate against contractors in non-EC countries, contractors in countries not signatories to the GPA, and contractors whose firms are not registered in Saudi Arabia. In fact, the antidiscrimination principle requires countries to treat all contractors equally, irrespective of their nationality of origin. All contractors should be treated in accordance with the standards to which local contractors are required to adhere.

**Sixth**, the finding in chapter nine indicates that the Review Committee of the Board (the appellate court) treats litigants unequally. Once panels of the Board issue judgement against private parties, i.e. procurement contractors, the latter bear the responsibility to appeal to the Review Committee within 30 days of receiving the judgement, otherwise they will lose the case. If the judgement is issued in favour of the contractor, the Board of Grievances (the Review Committee) itself will automatically take the action of appeal on behalf of the contracting authority if it fails to do so. By so doing, the Review Committee possesses a double function: to rehear the case, including any new argument or evidence, and an appellate court function. The Review Committee has power to confirm or revise a panel's decision or return it to the panel for further consideration. The Board's panels must review comments and answer questions raised by the Review Committee and send their considered opinion back to it. The Review Committee may accept or reject the panels' comments. If a panel

insists on standing by its original decision, the Review Committee has two options: to refer the case to another panel or to try the case itself. If it decides to try the case itself, it should conduct the hearing again, accept new evidence, and resort to experts if needed. The Review Committee's decision will be final and enforceable. It is recommended that the Review Committee should not accord public agencies favourable treatment over private contractors. It should treat them equally. If the judgements pertaining to public agencies have the right to be reviewed automatically, judgements pertaining to private contractors should receive similar treatment. Accordingly, it is recommended that the President of the Board should issue a decision to clarify the Review Committee's position regarding litigants before the Board.

### **3. The transparency is lacking**

Findings in previous chapters reveal lack of transparency in various procurement procedures.

**First,** findings in chapter five identify the urgent need to make procedures in the Saudi procurement market more transparent in the following context. Some contractors, especially foreign contractors, face difficulties in obtaining access to procurement regulations. In fact, transparent procedures and procurement regulations would attract investors otherwise reluctant to invest in the local market because procedures are ambiguous. What is needed is a uniform, transparent system that promotes competition among qualified contractors and suppliers of goods and services, which in turn will maximise the



government's opportunity to secure the best products at the most favourable prices.

**Second,** chapter six findings show that the Evaluation Committee does not need to justify its decision to reject or exclude tenderers before selecting the successful tenderer. This lack of transparency is common practice of Evaluation Committees in the country. Unsuccessful tenderers do not have the right to know why they lost the procurement competition. Therefore, it is recommended that the Evaluation Committee be required to publish in the *Official Gazette* its decisions for selecting the successful tenderer and unsuccessful tenderers be given sufficient time to challenge such decision to the contracting authority or to the Board.

**Third,** in chapter six, findings indicate that tendering procedures usually take a long time between the receipt of tenders, the Evaluation Committee's decision to award the contract, and the contractor being permitted to commence his performance. Sometimes tendering procedures take months, which may have a negative influence on the economic status of the successful contractor. Various prices may change during this period, which may affect his financial standing. Moreover, the contractor may incur additional cost, for example, banking fees to pay the performance bond. It is therefore recommended that the Purchasing Law should regulate that the procurement contract specifies a reasonable period for the tendering process. Moreover, there is no circular specifying the period between the award of the contract and the contractor being permitted to

commence his performance. It is recommended that law-makers specify a reasonable period in this regard in order to protect the right of the contractor and enable him to commence his performance as soon as possible.

**Fourth,** there is a failure to apply the principle of transparency in the sub-contracting agreement (chapter seven). In fact, there are no guidelines or regulations protecting the rights of sub-contractors or a contract form for main contractors to follow when contracting with sub-contractors. Contracting authorities should bear responsibility for publicising governmental circulars and instructions in series and issuing standard forms for the sub-contracting agreement. In order to assist transparency, it is recommended that workshop circles be formed to discuss the rights and obligations of sub-contractors.

**Fifth,** the findings in chapter nine show that the Board does not have a specific system of remedies, or clear rules to follow in legal claims in general, and procurement claims in particular. The Board's judges have discretion to provide remedy for procurement disputes. Analysis of the Board judgements indicate that the Board is able to grant three types of remedy: Interim relief (*Amr Mustajel*), a mandatory order (*Ta' weed Maley*), and an injunction order (*Amr Qadhaey*).

Interim relief must be requested by the contractor, and the Board is required to issue such relief within 24 hours of the request being made to remedy the alleged infringement or to prevent further damage, provided it accepts the justification for the request. A mandatory order (*Ta' weed Maley*) is

usually requested to gain a financial remedy to compensate for the contracting authority's breach of its contractual obligations.

Contractors may also claim an injunction remedy to restrain a contracting authority from acting unlawfully. It is usual practice for the Board to use an injunction order to restrain a public agency from continuing to act unlawfully. In addition, the Board has the power to force public agencies to perform their duties through issuance of a mandatory order. However, the findings show there is no framework to guide the Board's judges when they issue such an order, nor are there clear rules distinguishing a mandatory order from types of remedy.

#### **4. There are delayed payment problems**

Based on findings in chapter eight, procurement contractors have no security against late payment. Even if contractors suffer due to delayed payment, they have no right under Saudi procurement regulations to suspend their execution of the contract. Accordingly, they must continue performing the contract until the Board issues a court order to suspend the work or to compensate them for delayed payment. Chapter eight suggests that public budget policies are designed to increase the Finance Ministry's control over procurement activities in the country. The budgetary control system has tended to increase the Finance Ministry's central control rather than give each public agency the autonomy to deal with its own budget and pay its contractors directly since it has to send its bills to the Finance Ministry for payment. In fact, the financial procedure is one of the main reasons for the lateness of payment to

contractors. One public agency deals with a procurement contractor, while another, the Finance Ministry, withholds its power to pay such contractors directly. Lateness of payment occurs because the contracting authority has to prepare the contractor's bills for payment, send them to the Finance Ministry for authorisation of payment, and then await the Finance Ministry's authorisation and payment of bill amounts. It is recommended that the government find other sources to finance procurement contracts, in order to reduce dependence on public budget revenue. Moreover, in order for the government to avoid delay in paying its contractors, it should contract with local commercial banks to pay contractors on its behalf.

In addition to financial procedures, the Board has adopted two approaches to compensate contractors for delayed payment. These approaches are to extend the period of the contract and to give an exemption from the delay fine. Even where the contracting authority delays payment to the contractor, the Board requires the contractor to prove that he has suffered from such delay and to provide evidence of harm to himself in order to obtain remedy. If the contractor fails to prove his detriment, the Board will not remedy the contracting authority's breach. Once the contractor satisfies the Board of detriment to himself, the latter may extend the period of the contract if the delay in performance is caused by delay in payment. The other approach is for the Board to waive the delay fine, which is automatically imposed by the contracting authority if the contractor delays his performance.

### **5. The Expected Role of the Board of Grievances**

Findings in chapters three, four and nine reveal that in spite of the importance of the role of the Board of Grievances to develop Saudi administrative law in general and procurement regulations in particular, the Board's role has been limited to clarifying the general principles underlying laws and specifying their characteristics and limitations. For example, in the case of *Force Majeure*, an unforeseeable course of events during the contract period, such as an earthquake, war, or sudden price increase, the Board's role is limited to elucidating on the type of circumstance, whether it was expected or there was a likelihood of it occurring when the contractual agreement was made. Thus, the Board clarifies or explains the general principles for *Force Majeure* according to other juridicial laws, such as Egyptian or French, but does not establish new legal rules nor make new general principles. Accordingly, the Board's role in this case is qualificatory rather than innovative, in that it describes the legal case in question but does not introduce new principles of law for new legal problems.

In fact, the development of Saudi administrative law in general and procurement law in particular is dependent on the Board creating new legal principles. The Board of Grievances must, however, look for the fine point of balance between the public interest and private interest, and work at achieving such balance between the basic laws and legal principles that set forth the rights and duties of both the public authority and individuals.

It is recommended that the Board take a more active role in developing administrative law so that it remains abreast of national and international economic changes and legal principles and is consequently able to effectively meet ongoing development requirements.

### **B. Contributions of the Study**

This study draws the attention of Saudi law academic departments, professional organisations, lawyers, private firms, Saudi Chambers of Commerce, and public agencies to the importance of the procurement sector in general, and the need to protect the rights of procurement contractors and give procurement studies more attention in education in particular. It also urges procurement firms to cooperate in order to solve their problems and to create a procurement organisation to represent their interests. It also provides a foundation for future research on procurement, assists development and improvement of the Saudi procurement sector, fills the gap in the literature, and extends knowledge of procurement activities. It is the first on Saudi government procurement and policy registered in the UK.

In addition, it is anticipated that the results of this study will be useful to contracting authorities and government departments in the country. The study should help governmental employees working in procurement sections to better understand practices overall, and produce solutions to existing shortcomings in current regulations.

Moreover, this study presents many important suggestions for reforming Saudi Purchasing Law, which may help Saudi law-makers, especially in the Council of Ministers and the Consultative Council, empowered with the jurisdiction to draft and enact regulations in the country, to identify major obstacles in procurement regulations and provide means to overcome them.

Saudi team members representing Saudi Arabia in negotiations to join the GPA which will start the negotiation within a year from the accession date to the WTO 11/12/2005, might find the study's findings useful for providing answers to questions posed by other negotiators regarding various provisions of the Purchasing Law.

The findings of this study identify many areas in the Saudi Purchasing Law which need reform to address increasing complaints from traders, contractors and banks, that this sector has failed to keep up with the development that Saudi Arabia has experienced generally.

Due to lack of studies on the procurement sector in Saudi Arabia, the following recommendations are based on the study's findings and to make further contributions to the procurement sector in the country.

### **C. Recommendations for Future Research**

Since this study has been limited to investigating particular rights of procurement contractors i.e. the right to receive payment, remedies, another study should be undertaken to investigate other rights. For example, a detailed

study is needed to examine the rights of procurement contractors in the case of *Force Majeure*, an Act of God, and Act of Government since their may result in unforeseen circumstances during the contract period. In addition, an in-depth study could be conducted using the information provided in this study to clarify the rights of the contractor if a contract should be terminated, and his rights when the contracting authority imposes procurement penalties.

Moreover, there is a need to investigate the impact of the procurement sector on the national economy, the environment and social activities in the country. In particular, studies should be conducted to explore the likely impact of Saudi Arabia joining the GPA on local products and contractors.

Finally, more studies should be encouraged to examine the role of private firms, such as Saudi Chambers of Commerce, in developing and improving the procurement sector in the country.

#### **D. General Recommendations**

Based on findings in Chapter four, it is recommended that:

The Saudi government should study the provisions in procurement regulations which discriminate in favour of Saudi products and contractors, since they have been adopted for more than three decades to ascertain their impact on local products and contractors in particular and the national economy in general.



To solve the absence of transparency in Saudi legal information in general and procurement regulations in particular, it is submitted that the government train its employees to become aware of the importance of disclosing legal and procurement information, which will encourage all citizens in the country bring their work practice and attitude into line with the principles of the law.

It is recommended that each public agency should have an area near its entrance where copies of various laws and regulations can be distributed to.

It is also recommended that the Council of Ministers ensures that all public and private libraries hold copies of every law and regulation, which will make it easier for interested people to gain access to them.

Although public agencies have the power to contract, they do not have control over payment of the contract. Contractors' bills have to be submitted to the Finance Ministry for payment even though it has no direct relationship with contractors. It is therefore recommended that public agencies should have autonomy to control payment of the contract.

It is recommended that law-makers undertake scientific investigations into the weakness of contractual obligations in procurement contracts in order to assess the actual situation before making any further decisions regarding procurement. They should send a draft of procurement regulations to lawyers, judges of the Board, and the procurement section in Saudi Chambers of

Commerce to elicit their ideas, experiences, and suggestions to develop procurement regulations.

It is recommended that the General Audit Office should analyse the accountability of public agencies involved in procurement activities during the last three decades to support the strengths and avoid the weaknesses of the sector.

The above findings and recommendations highlight the need to rethink public procurement policy in Saudi Arabia. Significant changes in the purposes of procurement globally and locally support the need to reform the policy. It is recommended to immediately commence a radical overhaul of the way in which it is carried out. Reform of the procurement sector in the country will be achieved through a combination of policy and public management reform.

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